SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES (Cont.)

TABLE OF CASES (Cont.)

TABLE OF TEXTBOOKS

TABLE OF STATUTES

In the Supreme Court
of the United States

OCTOBER TERM, 1947

No.....

C. D. JOHNSON LUMBER CORPORATION, a corporation,

Petitioner,

vs.

OREGON MESABI CORPORATION, a corporation,

Respondent.

C. D. JOHNSON LUMBER CORPORATION, a corporation,

Petitioner,

vs.

OREGON MESABI CORPORATION, a corporation,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRITS OF CERTIORARI

To The Honorable the Supreme Court of the United States:

Your petitioner, C. D. Johnson Lumber Corporation, a corporation, through its counsel, respectfully petitions this Honorable Court for writs of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the decrees of that Court, entered December 12, 1947, in the cases entitled Oregon Mesabi Corporation, appellant, vs. C. D. Johnson Lumber Corporation, appellee, Docket No. 11569, and Oregon Mesabi Corporation, appellant, vs. C. D. Johnson Lumber Corporation, appellee, Docket No. 11570, reversing the judgments of the District Court of the United States for the District of Oregon.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

These two actions were brought in the Circuit Court of the State of Oregon for the County of Lincoln by C. D. Johnson Lumber Corporation, a Nevada corporation, duly qualified for the doing of business in Oregon and operating a sawmill at Toledo, Oregon, for the condemnation of two rights-of-way over the lands of respondent, Oregon Mesabi Corporation, a Delaware corporation, for use as roads in transporting timber and other raw products of the forest from timberlands owned by petitioner to its sawmill at Toledo. The first right-of-way is 60 feet wide and slightly over a mile in length. The other right-of-way is a spur road taking off at a midway point of the first right-of-way and is 60 feet

wide and about a quarter mile long (11569 R. 2-8; 11570 R. 2-3).

These actions were filed pursuant to Chapter 2, Title 12 of the Oregon Compiled Laws Annotated, which statutes were passed following the adoption by referendum of an amendment to Article I, Section 18, of the Oregon Constitution. The rights-of-way involved traverse rough and sparsely populated lands valuable almost entirely for the timber thereon. Following the filing of these actions, respondent removed them to the District Court of the United States for the District of Oregon (11569 R. 8-22; 11570 R. 4-6).

The cases proceeded to trial before the District Court (McColloch, J.) on the issue of necessity for the taking (11569 R. 183-304), followed by a jury trial on the issue of damages (11569 R. 304-653). The two cases were consolidated for trial (11569 R. 77; 11570 R. 17).

At the trial petitioner introduced in evidence, over objections by respondent, (plats of surveys) Exhibits 9 (Case 11569) (11569 R. 197, 311, 715) and 10 (Case 11570) (11569 R. 201, 365, 716), showing the location of the rights-of-way sought to be condemned, and related Exhibits 11 (paper locations) (11569 R. 203, 374)* and 12 (profiles) (11569 R. 205, 378)*. The rights-of-way sought to be condemned were described in petitioner's complaints (11569 R. 4-6; 11570 R. 2-3) and were staked out on the ground (11569 R. 239, 240, 250, 256,

*Exhibits 11 and 12 considered in original form by Circuit Court of Appeals for Ninth Circuit.

261, 364, 402, 403, 451, 452). The witnesses' testimony, both as to necessity and as to value, was based upon a view of the actual location of the rights-of-way as staked out on the ground as well as shown on (plats of surveys) Exhibits 9 and 10 and related Exhibits 11 (paper locations) and 12 (profiles) (11569 R. 239, 240, 250, 256, 361, 364, 402, 403, 451, 452).

The surveys were conducted under the supervision and control of petitioner's logging superintendent, who is a registered engineer and whose duties included superintending the laying out of all roads and superintending petitioner's surveys in the regular course of petitioner's business (11569 R. 194). Said Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378) were compiled from field notes of the surveys made under his direction and supervision and with his help and were sponsored by him as being correct representations of results of the surveys (11569 R. 197, 200, 203, 204, 374, 378).

After the trial separate orders were issued "adjudging use and necessity," and separate verdicts were filed and separate judgments entered (11569 R. 79-100; 11570 R. 19-28).

Respondent appealed from the judgments of the District Court to the United States Circuit Court of Appeals for the Ninth Circuit, contending, among other things, that the District Court erred in admitting in evidence said Exhibits 9, 10, 11 and 12 (plats of sur-

veys), and that the District Court erred in instructing the jury in each case that the interest acquired by the petitioner is an unlimited easement, subject to the right of the respondent to make such necessary crossings of the rights-of-way as will not interfere with the use of the rights-of-way by petitioner, for its logging purposes, respondent contending that the interest acquired by the petitioner in each case is a qualified fee title (11569 R. 727-730; 11570 R. 42-45).

Petitioner contended that said Exhibits 9, 10, 11 and 12 (plats of surveys) were admissible in evidence under both Oregon law and Federal law. Petitioner further contended that the lower court correctly instructed the jury as to the quantum of interest to be acquired by petitioner in the condemnation proceedings.

The Circuit Court of Appeals rendered its opinions, reversing the judgment of the lower court on two main grounds (11569 R. 742-752; 11570 R. 62): (1) that Oregon law was applicable and that Oregon law did not permit the introduction into evidence of said plats of surveys, Exhibits 9, 10, 11 and 12 (11569 R. 751-752); (2) that the failure of the District Court to make a finding as to whether the reasonably necessary right-of-way should be *exclusive* or *ordinary* prevented the proper determination of the measure of damages in each case (11569 R. 748-759).

The Circuit Court of Appeals entered its decrees reversing the judgments of the District Court (11569 R. 753; 11570 R. 63).

A petition for rehearing of said cases was denied by the Circuit Court of Appeals (11569 R. 762-763; 11570 R. 72-73).

STATEMENT ON JURISDICTION

The statutory provision under which it is contended that the Supreme Court of the United States has jurisdiction upon writs of certiorari to review the decrees of the United States Circuit Court of Appeals for the Ninth Circuit is (Judicial Code, Section 240, amended) Title 28, U.S.C.A. § 347.

The specific grounds for the contention are:

(1) The United States Circuit Court of Appeals for the Ninth Circuit has decided an important question of Federal law, namely, the applicability in the Federal courts of the Federal Business Records Acts, 49 Stat. 1561, c. 640, 28 U.S.C.A. § 695, to the admission of evidence in condemnation proceedings instituted under state law, which question has not been, but should be, settled by this Court.

(2) The United States Circuit Court of Appeals for the Ninth Circuit has rendered decisions in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in

> *Westchester County Park Commission v. United States* (1944) 143 F. (2d) 688,

on the matter of the applicability of Rules of Civil Pro-

cedure, 28 U.S.C.A. foll. § 723c, on appeal in condemnation proceedings.

(3) The United States Circuit Court of Appeals for the Ninth Circuit, in holding that the District Court erred in admitting the plats of surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374 and 12 (11569 R. 205, 378), as part of the oral testimony of the witness who verified them, has decided an important question of evidence in condemnation proceedings in the Federal courts, which question has not been, but should be, settled by this court.

(4) The United States Circuit Court of Appeals for the Ninth Circuit has decided an important question of local law, namely, the interest acquired by the condemnor in condemnation proceedings under Oregon statutory law, in a way probably in conflict with applicable local decisions.

(5) The Supreme Court of the United States has repeatedly granted writs of certiorari in cases involving the exclusion or admission of evidence when such exclusion or admission affected the substantial rights of the parties.

Connecticut Mutual Life Insurance Co. v. Union Trust Co. (1884) 112 U.S. 250, 5 S. Ct. 119, 28 L. ed. 708.

French v. Hall (1886) 119 U.S. 152, 7 S. Ct. 170, 30 L. ed. 375.

Throckmorton v. Holt (1901) 180 U.S. 552, 21 S. Ct. 474, 45 L. ed. 663.

Leach & Co., Inc. v. Peirson (1927) 275 U.S. 120, 48 S. Ct. 57, 72 L. ed. 194.
Williams v. Great Southern Lumber Company (1928) 277 U.S. 19, 48 S. Ct. 417, 72 L. ed. 761.

QUESTIONS PRESENTED

The questions herein presented are as follows:

(1) Whether, in a District Court of the United States in a condemnation proceeding instituted pursuant to state law, plats of surveys, duly authenticated and made in the regular course of business and where it was the regular course of such business to make such plats, are admissible in evidence under the Federal Business Records Act where a specific state statute pertaining to the admission in evidence of a survey (plats of survey) exists in the state in which the District Court sits.

(2) Whether Rule 43 (a) of the Rules of Civil Procedure is applicable in a condemnation proceeding on appeal from a judgment of a District Court.

(3) Whether plats of a survey verified by a witness who testified to a personal knowledge of all the facts contained therein and who vouched for the accuracy of such facts were admissible as a part of the oral testimony of such witness.

(4) Whether Rule 61 of the Rules of Civil Procedure is applicable in a condemnation proceeding on appeal

from a judgment of a District Court.

(5) Whether the Circuit Court of Appeals for the Ninth Circuit failed to apply the applicable local law as to the interest acquired by petitioner in the lands of respondent.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Petitioner submits that this Court should review the decisions of the United States Circuit Court of Appeals for the Ninth Circuit for the following reasons:

(1) Whether, in a District Court of the United States in a condemnation proceeding instituted pursuant to state law, plats of surveys, duly authenticated and made in the regular course of business and where it was the regular course of such business to make such plats, are admissible in evidence is an important question of Federal law which has not been but should be settled by this court.

(2) The decisions of the Circuit Court of Appeals for the Ninth Circuit in the instant cases, in failing to apply the Federal Rules of Civil Procedure upon appeal of a condemnation case, are in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in

Westchester County Park Commission v. United States (1944) 143 F. (2d) 688, 694.

(3) The United States Circuit Court of Appeals for the Ninth Circuit, in holding that the District Court

erred in admitting the plats of surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378), as part of the oral testimony of the witness who verified them, has decided an important question of evidence in condemnation proceedings in the Federal courts, which question has not been, but should be, settled by this court.

(4) The United States Circuit Court of Appeals for the Ninth Circuit has decided an important question of local law, namely, the interest acquired by the condemnor in a condemnation proceeding under the Oregon statute, in a way probably in conflict with applicable local decisions.

Argument in support of these points is included in the attached brief.

WHEREFORE, your petitioner prays that writs of certiorari issue under the seal of this court to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify, and to send to this Court, a full and complete transcript of the records and of the proceedings of said Circuit Court had in

Oregon Mesabi Corporation, appellant, vs. C. D. Johnson Lumber Corporation, appellee. Docket No. 11569

Oregon Mesabi Corporation, appellant, vs. C. D. Johnson Lumber Corporation, appellee. Docket No. 11570

to the end that these causes may be fully reviewed and

all matters and issues determined by this Court as provided for by the statutes of the United States; that the decrees of the United States Circuit Court of Appeals for the Ninth Circuit in these cases be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated April 1, 1948.

KING, WOOD, MILLER & ANDERSON,
ROBERT S. MILLER,
926 American Bank Building,
Portland 5, Oregon,
Counsel for Petitioner.

In the Supreme Court
of the United States

OCTOBER TERM, 1947

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C. D. JOHNSON LUMBER CORPORATION, a corporation,

Petitioner,

vs.

OREGON MESABI CORPORATION, a corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

PROCEEDINGS IN COURTS BELOW

A. Original jurisdiction of these causes by the District Court of the United States for the District of Oregon was obtained under Sec. 41 (1) (Judicial Code, Section 24, amended) Title 28, U.S.C.A., providing that

such District Court shall have original jurisdiction of civil suits at common law or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and is between citizens of different states.

B. November 1, 1946, the District Court of the United States for the District of Oregon entered orders adjudging the use and necessity of the condemnation of rights-of-way for logging roads across respondent's land (11569 R. 79-85; 11570 R. 19-20).

C. November 13, 1946, the judgments of the District Court of the United States for the District of Oregon were entered and filed (11569 R. 93-100; 11570 R. 22-28).

D. December 12, 1947, the opinions of the United States Circuit Court of Appeals for the Ninth Circuit were rendered and filed (11569 R. 742-752; 11570 R. 62). Neither opinion has been officially reported at the time of preparation of this brief.

E. December 12, 1947, the decrees of the United States Circuit Court of Appeals for the Ninth Circuit were entered and filed (11569 R. 753; 11570 R. 63).

F. March 3, 1948, a petition for rehearing of said cause was denied by the United States Circuit Court of Appeals for the Ninth Circuit (11569 R. 762, 763; 11570 R. 72-73).

G. March 8, 1948, the United States Circuit Court of

Appeals for the Ninth Circuit filed orders staying issuance of mandates.

JURISDICTION

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240, Judicial Code, amended, Title 28, U.S.C.A. § 347.

Petitioner further invokes the jurisdiction of this Court on the basis of the statement on jurisdiction included in the preceding petition (pp. 6 to 8) and by reference adopts those statements herein. In order to conserve the time of the Court, petitioner will not repeat or elaborate upon said statements except to submit further argument herein to support the conclusion that the United States Circuit Court of Appeals for the Ninth Circuit erred in reversing the judgments of the District Court of the United States for the District of Oregon.

STATEMENT OF FACTS

The statement included in the preceding petition (pp. 2 to 6) is hereby adopted and by reference made a part of this brief for purposes of brevity.

SPECIFICATION OF ERRORS

1. The United States Circuit Court of Appeals for the Ninth Circuit erred in applying Oregon law in determining the admission in evidence of the plats of the

surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374)* and 12 (11569 R. 205, 378)*.

2. The United States Circuit Court of Appeals for the Ninth Circuit erred in failing to hold that under the Federal Business Records Act the plats of surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378) were admissible in evidence.

3. The United States Circuit Court of Appeals for the Ninth Circuit erred in not complying with the mandate of Rule 43 (a), Rules of Civil Procedure, under which an appellate court, in the event of an appeal from a district court, is required to admit all evidence which is admissible under the statutes of the United States.

4. The United States Circuit Court of Appeals for the Ninth Circuit erred in failing to hold that the plats of the surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378) were admissible in evidence as part of the oral testimony of petitioner's witness who verified them.

5. The United States Circuit Court of Appeals for the Ninth Circuit errred in failing to give effect to Rule 61, Rules of Civil Procedure, under which a harmless error in the admission of evidence is not grounds for reversible error.

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*Exhibits 11 and 12 considered in original form by Circuit Court of Appeals for Ninth Circuit.

6. The United States Circuit Court of Appeals for the Ninth Circuit, in reversing the decision of the District Court for the latter's failure to find whether the interest acquired by the condemnor in a condemnation proceeding instituted under a state statute was an *exclusive* or *ordinary* use, erred in deciding an important question of local law in a way probably in conflict with applicable local decisions.

SUMMARY OF ARGUMENT

As a summary of the argument under each of the above Specification of Errors, petitioner refers the Honorable Court to the statement of "Reasons Relied on for the Allowance of the Writ" included in the preceding petition (pp. 9 to 10) and adopts the same by reference as a part of this brief.

Petitioner summarizes its argument as follows:

I.

Evidence Tending to Establish the Location of the Rights-of-Way Sought to Be Condemned Was Properly Admitted in the District Court in the Condemnation Proceedings Instituted Pursuant to Oregon Law

A. The United States Circuit Court of Appeals for the Ninth Circuit erred in applying Oregon law in determining the admission in evidence of the plats of the surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569

R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378).

B. The plats of the surveys, said Exhibits 9, 10, 11 and 12, were admissible in evidence under the Federal Business Records Act.

C. Rule 43 (a) of the Rules of Civil Procedure requires an Appellate Court, in the event of an appeal from the District Court, to admit all evidence which is admissible under the statutes of the United States. One of those statutes is the Federal Business Records Act under which the plats of the surveys, said Exhibits 9, 10, 11 and 12, were admissible in evidence.

D. The plats of the surveys, said Exhibits 9, 10, 11 and 12, were admissible in evidence as a part of the oral testimony of petitioner's witness who verified them.

E. The Circuit Court of Appeals was required to give effect to Rule 61 of the Rules of Civil Procedure. Therefore, if any error was committed, admitting into evidence the plats of the surveys, said Exhibits 9, 10, 11 and 12, such error was harmless and nonprejudicial and did not constitute reversible error.

II.

The District Court Correctly Applied the Applicable Local Law as to the Quantum of Interest Acquired by the Condemnor in Condemnation Proceedings Instituted Pursuant to Oregon Law

A. The Oregon law grants to the condemnor the right to take the minimum interest necessary for the completion of its purpose.

B. The District Court correctly applied the local law.

C. The Circuit Court of Appeals erred in reversing the decision of the District Court on the ground that its failure to make a finding as to whether the use of the rights-of-way to be taken was to be *exclusive or ordinary* constituted reversible error.

ARGUMENT

Point I.

Evidence Tending to Establish the Location of the Rights-of-Way Sought to Be Condemned Was Properly Admitted in the District Court in the Condemnation Proceedings Instituted Pursuant to Oregon Law

A. *The United States Circuit Court of Appeals for the Ninth Circuit erred in applying Oregon law in determining the admission in evidence of the plats of the*

surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378).

B. *The plats of the surveys, said Exhibits* 9, 10, 11 *and* 12, *were admissible in evidence under the Federal Business Records Act.*

Rule 81 (a) (7), *Rules of Civil Procedure,* 28 *U.S.C.A. foll.* § 723c,

provides as follows:

> "In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable."

Therefore, in the District Courts of the United States in condemnation proceedings the Rules of Civil Procedure do not apply, and it is necessary to resort to another body of law to find the controlling rules.

28 *U.S.C.A.* § 724, *R. Stat.* 914,

commonly known as the Conformity Act, provides as follows:

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

This act generally has not been applied to rules of evidence.

Connecticut Mutual Life Insurance Co. v. Union Trust Co. (1884) 112 U.S. 250, 5 S. Ct. 119, 28 L. ed. 708.

Camden & Suburban Railway Co. v. Stetson (1900) 177 U.S. 172, 20 S. Ct. 617, 44 L. ed. 721.

Nashua Savings Bank v. Anglo-American Land, Mortgage & Agency Co. (1903) 189 U.S. 221, 23 S. Ct. 517, 47 L. ed. 782.

Moore's Federal Practice (1938) Vol. 3, p. 3057.

28 *U.S.C.A.* § 725, *R. Stat.* 721,

commonly known as the Rules of Decision Act, provides as follows:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The Rules of Decision Act has generally been considered to be applicable to rules of evidence.

Connecticut Mutual Life Insurance Co. v. Union Trust Co., supra.

Camden & Suburban Railway Co. v. Stetson, supra.

Nashua Savings Bank v. Anglo-American Land, Mortgage & Agency Co., supra.

Moore's Federal Practice, supra.

The Rules of Decision Act has been uniformly construed as requiring the Federal courts in the trial of all civil cases at common law, not within the exceptions

named, to observe as rules of decision the rules of evidence prescribed by the laws of the states in which such courts are held.

Connecticut Mutual Life Insurance Co. v. Union Trust Co., supra.

A condemnation proceeding is considered in the nature of a suit at common law.

Kohl v. U. S. (1876) 91 U.S. 367, 23 L. ed. 449.

Consequently, under the Rules of Decision Act, the laws of Oregon as to the admission or exclusion of evidence in the District Court for the District of Oregon in a condemnation proceeding will control unless a Federal statute or a treaty or the Constitution of the United States provides otherwise.

Section 87-306, O.C.L.A., relied upon in the instant cases by the Circuit Court of Appeals which held that plats of surveys, Exhibits numbered 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378), were erroneously admitted in evidence by the Distict Court, has no application for the reason that a Federal statute is applicable.

The applicable Federal statute is the Federal Business Records Act, adopted on June 20, 1936,

49 *Stat.* 1561 c. 640, 28 *U.S.C.A.* § 695,

which provides:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

It is a well settled rule that where Congress has legislated on a question of the admission of evidence and prescribed a definite rule for the government of its courts it is to that extent exclusive of any legislation of the states in this same manner.

Whitford v. Clark County (1886) 119 U.S. 522, 7 S. Ct. 306, 30 L. ed. 500.

Connecticut Mutual Life Insurance Co. v. Schaefer (1877) 94 U.S. 457, 24 L. ed. 251.

Ex parte Fisk (1885) 113 U.S. 713, 5 S. Ct. 724, 28 L. ed. 1117.

Southern Pacific Co. v. Denton (1892) 146 U.S. 202, 13 S. Ct. 44, 36 L. ed. 942.

Tot v. United States (1943) 319 U.S. 463, 467, 63 S. Ct. 1241, 87 L. ed. 1519.

In the instant cases the plats of surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378), were writings or records made in the regular course of petitioner's business, and it was the regular course of petitioner's business to make such writings or records at the time of making surveys. The record abundantly shows that petitioner was and is engaged in logging and cutting and removing timber from timberlands in Lincoln County, Oregon.

The individual directing the surveys was an experienced and competent surveyor, and it was within his regular duties to make surveys (11569 R. 194-197, 325). The individuals on the survey team were acting in the regular course of their employment (11569 R. 317, 325, 336, 365, 368-369, 378).

The plats of the surveys were properly admitted in the District Court, and the rights-of-way sought to be condemned were adequately described by such evidence.

The Circuit Court of Appeals, in holding that the plats of the surveys were not admissible under *Oregon* law, was in error. The Federal Business Records Act was applicable and should have been applied.

For examples of records which have been admitted under the Federal Business Records Act or similar state statutes see:

Backun v. U. S. (CCA 4, 1940) 112 F. (2d) 635 (laundry ticket).

U. S. v. Mortimer (CCA 2, 1941) 118 F. (2d) 266, cert. den. 314 U.S. 616, 86 L. ed. 496, 62 S. Ct. 58 (charts showing defaults in payment of taxes).

Zurich v. Wehr (CCA 3, 1947) 163 F. (2d) 791 (logbook of tug).

Thompson v. Machado (1947, Dist. Ct. of Appeal, 3rd Dist., Cal.) 178 P. (2d) 838 (sales tag).

Gallagher v. Portland Traction Co. (1947) 44 Or. Advance Sheets 787, 182 P. (2d) 354 (hospital record).

Douglas Creditors Association v. Padelford (1947) 44 Or. Advance Sheets 761, 182 P. (2d) 390 (index card record of physician).

cf.

Heike v. U. S. (1913) 227 U. S. 131, 33 S. Ct. 226, 57 L. ed. 450.

Palmer v. Hoffman (1943) 318 U. S. 109, 113, 63 S. Ct. 477, 87 L. ed. 645.

Northern Pac. Ry Co. v. Keyes et al. (1898, C.C. N.D.) 91 Fed. 47, 59.

Wightman v. Campbell (1916) 217 N.Y. 479, 112 N.E. 184.

20 *Am. Jur., Evidence,* § 983.

C. *Rule* 43 (a) *of the Rules of Civil Procedure requires Circuit Courts of Appeal to apply the "more generous rule" as to the admission of evidence. Under said rule the Circuit Court of Appeals for the Ninth Circuit erred in not complying with the mandate of said rule pursuant to which the plats of the surveys, Exhibits* 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716),

11 (11569 R. 203, 374) and 12 (11569 R. 205, 378), *were properly admissible in evidence.*

Rule 81 (a) (7), *Rules of Civil Procedure,* 28 *U.S.C.A. foll.* § 723c,

provides as follows:

> "In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable."

On *appeal* the Rules of Civil Procedure are applicable.

Rule 43 (a) *of the Rules of Civil Procedure,*

provides in part as follows:

> " * * * All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. * * *"

Rule 43 (a) of the Rules of Civil Procedure above quoted makes it mandatory upon a Circuit Court of Appeals, in the event of an appeal from a District Court, to admit all evidence which is admissible under the statutes of the United States. One of those statutes is the Federal Business Records Act,

49 *Stat.* 1561 c. 640, 28 *U.S.C.A.* § 695 (supra, p. 23),

under which plats of surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378) were admissible in evidence.

The Circuit Court of Appeals erred in failing to conform to the mandate of Rule 43 (a) of the Rules of Civil Procedure and specifically in failing to apply the more liberal rule of evidence, that is, the Federal Business Records Act, supra, as to the admissibility of the plats of surveys in the instant case. The Circuit Court of Appeals for the Ninth Circuit, in failing and refusing to conform to the mandate of Rule 43 (a) of the Rules of Civil Procedure, rendered an opinion in conflict with that of another Circuit Court of Appeals.

In

Westchester County Park Commission v. United States (1944) 143 F. (2d) 688, 694-695,

the District Court in a condemnation proceeding had permitted the introduction into evidence of certain testimony regarding sales of similar property. This might have constituted reversible error under the New York law. The Circuit Court of Appeals for the Second Circuit refused to reverse the judgment of the District Court and stated:

> "For, as under Rule 81 (a) (7), 28 U.S.C.A. following section 723c, the new rules of procedure are applicable to appeals in condemnation cases, we must, under Rule 43 (a), apply the more generous

rule of evidence; therefore, the federal 'harmless error' statute (28 U.S.C.A. § 391) governs; under that statute, the admission of the testimony was surely harmless."

Also see:

Wittmayer et ux v. United States (CCA 9, 1941) 118 F. (2d) 808 (Rule 52 (a) held applicable on appeal).
United States v. Lambert (CCA 2, 1944) 146 F. (2d) 469.
United States v. Delano Park Homes (CCA 2, 1944) 146 F. (2d) 473.
Iriarte v. United States (CCA 1, 1946) 157 F. (2d) 105.
Porrata et al. v. United States (CCA 1, 1947) 158 F. (2d) 788.
Atwater Kent Mfg. Co. v. United States (D.C. Pa., 1943) 53 F. Supp. 472.

D. *The plats of the surveys were admissible in evidence as part of the testimony of petitioner's witness.*

The plats of the surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378) were properly admitted in evidence as part of the oral testimony of petitioner's witness Jacoby who supervised the making of the surveys. These exhibits were verified by this witness, who testified to a personal knowledge of all the facts contained therein and vouched for the accuracy of such facts (11569 R. 197, 202-204, 309-310, 320, 323-324). The four exhibits were but pictorial representations of the results of the survey upon the ground. They were,

therefore, admissible as a part of his oral testimony as a representation of his own knowledge under general rules of evidence.

Wigmore on Evidence (3rd Ed. 1940) 791, 793, 794.
Seabrook v. Coos Bay Ice Co. (1907) 49 Or. 237, 89 Pac. 417, 419.
Cody v. Black (1920) 97 Or. 343, 348, 191 Pac. 319, 192 Pac. 282.
Walling v. Van Pelt (1930) 132 Or. 243, 246, 285 Pac. 262, 263.
Portland & Seattle Ry. Co. v. Ladd (1907) 47 Wash. 88, 91 Pac. 573, 574-575.
Portland & Seattle Ry. Co. v. Clarke County (1908) 48 Wash. 509, 93 Pac. 1083.
Lewis v. Carr (1933) 177 Ga. 761, 171 S.E. 298.
Rieke v. Kentucky Utilities Co. (1929) 231 Ky. 700, 22 S.W. (2d) 98.

Also see:

Northern Pacific Railway Co. v. Keyes et al. (C.C. N.D. 1898) 91 Fed. 47, 59.

Petitioner's witness Jacoby testified that he had directed an engineer employed by petitioner to make the survey of the rights-of-way sought to be condemned (11569 R. 197-199, 200-205, 310, 313, 317-318, 335-336). In the very nature of surveying, it is required that more than one man participate in making the survey, but the responsibility was that of Jacoby's, and it was, in accordance with normal surveying practice, his surveyor's license which vouched for the accuracy of the surveys although the field work was done partly by others. He

testified that he was responsible for the survey as pictured on Exhibits 9 and 10, that he checked the work of the men in the field and supervised their activities (11569 R. 197-199, 200-205, 310, 314). Furthermore, he also testified as to the accuracy and preparation of Exhibits 11 and 12 (11569 R. 335-336, 338-339). Exhibit 11 shows the same center line traverse as Exhibits 9 and 10, the same engineer's stations, and is, in fact, a part of the same survey. This may be said also of Exhibit 12 as far as elevations are concerned. The witness Jacoby not only supervised and directed the preparation of these exhibits but also did a great deal of the field work himself.

The Circuit Court of Appeals for the Ninth Circuit erred in holding that the plats of surveys, Exhibits 9, 10, 11 and 12, were not admissible in evidence as a part of the oral testimony of petitioner's witness who verified them.

E. *If the admission in evidence of the plats of surveys was, in fact, error, it was harmless error and under Rule* 61, *Rules of Civil Procedure, the Circuit Court of Appeals should not have reversed the decision of the District Court.*

The plats of the surveys were admissible both as surveys and as a part of the oral testimony of the witness who verified them; there was uncontroverted testimony that the survey as staked out upon the ground corresponded with the rights-of-way proposed to be

condemned; if any error occurred in regard to the admission of the surveys, it was harmless and nonprejudicial.

Testimony was given that the proposed roads, as staked out in the creek bottom, corresponded with the roads sought to be condemned (11569 R. 239-240, 324-325). The witness who superintended the taking of the survey so testified, and his testimony was not contradicted in any way. Such being the case, any error in the admission of Exhibits 9 (11569 R. 197, 311, 715) and 10 (11569 R. 201, 365, 716), if such error there was, was harmless, for all the witnesses testified to the value of the land as staked out and to the damages resulting from the appropriation of such roads, without objection on that ground.

All of the witnesses who testified as to the damages resulting to respondent by reason of the condemnation of the two rights-of-way by petitioner premised their opinions upon the assumption that petitioner was condemning the rights-of-way shown by the stakes (11569 R. 452, 490, 495, 499, 526, 528, 392, 402-403, 411-412); therefore, the plats of surveys identified as Exhibits 9 and 10 were not absolutely essential to the determination of the case, and their admission in evidence, even if, in fact, erroneous, did not and could not result in substantial prejudice to respondent and, at worst, could be but harmless error under Rule 61 of the Rules of Civil Procedure, which rules are applicable on the ap-

peal of a condemnation proceeding in the Federal courts (supra, p. 26).

If a technical error was committed by the trial court in admitting the exhibits of the survey, it was harmless error, it did not affect the substantial rights of the parties, and under said Rule 61 it was not a ground for the reversal of the District Court's judgments.

United States v. Miller (1943) 317 U.S. 369, 63 S. Ct. 276, 87 L. ed. 336.
Westchester County Park Commission v. United States, supra.
Atwater Kent Mfg. Co. v United States, supra.

See also:

28 *U.S.C.A.* § 391.

Point II.

The District Court Correctly Applied the Applicable Local Law as to the Quantum of Interest Acquired by the Condemnor in Condemnation Proceedings Instituted Pursuant to Oregon Law

With respect to the interest acquired by the condemnor under Oregon law, numerous decisions have interpreted the interest acquired. It is well established that a fee title could not be condemned by petitioner.

O. R. & N. Co. v. Oregon Real Estate Co. (1882) 10 Or. 444, 445-446.

The condemnor was entitled only to the minimum interest necessary for the fulfillment of its purpose. It was not entitled to more than an easement.

Coos Bay Logging Co. v. Barclay (1938) 159 Or. 272, 79 P. (2d) 672.
Warm Springs Irrigation District et al. v. Pacific Live Stock Co. (CCA 9, 1921) 270 Fed. 560, 562.
Western Union Telegraph Co. v. Polhemus et al. (CCA 3, 1910) 178 Fed. 904, 906-907.
Shedd v. State Line Generating Co. (CCA 7, 1930) 41 F. (2d) 505, 507.
18 *Am. Jur., Eminent Domain,* Sec. 115, 120, 121, pp. 741, 744-745.
30 *C.J.S., Eminent Domain,* § 451, p. 207.
155 *A.L.R. Anno.* 381.

Section 12-202, *O.C.L.A.,*

relating to condemnation of "logging roads" provides as follows:

> "Any such person, firm or corporation shall have the right to acquire and own all lands reasonably necessary for said logging road or way to promote the transportation of logs or the raw products of the forests. If such person, firm or corporation is unable to agree with the owners of the land over which said logging railroad is necessary, as to the amount of compensation to be paid therefor, such person, firm or corporation shall have the right to condemn so much of the land necessary for such logging railroad, road or ways as may be necessary for the use of such way, road or logging railway, and may maintain a suit for the condemnation thereof in the circuit court of the county wherein said lands are located; provided, that no land shall be taken here-

under until compensation therefor has been assessed and tendered as herein provided."

The jury was correctly instructed by the District Court, in accordance with the court's statement to counsel for both petitioner and respondent prior to the jury trial on the issue of damages, in substance that petitioner would get an unlimited easement (that is, unlimited as to time) and that respondent could cross over these rights-of-ways so long as such crossings did not interfere with petitioner's use of the rights-of-way for its logging purposes (11569 R. 639-640, 643). There could be no question in the minds of the members of the jury as to what interest was sought to be condemned. The instructions of the District Court to the jury were in conformity with the local law.

Nevertheless, in spite of this correct application of the local law by the District Court, the Circuit Court of Appeals held the District Court to be in error in failing to determine whether the use of the condemned property was to be exclusive or ordinary. The holding of the Appellate Court that the question as to whether the rights-of-way were for petitioner's exclusive use was left undetermined by the lower court is entirely incorrect and unjustified.

Coos Bay Logging Co. v. Barclay (1938) 159 Or. 272, 284, 79 P. (2d) 672.

The rights-of-way were not for petitioner's exclusive use. It was for the District Court to determine what the na-

ture of the rights sought to be taken by petitioner should be. Under the authorities petitioner was entitled to the minimum right needed to accomplish its purpose, and the court, at the conclusion of the hearing on necessity, determined that that did not call for exclusive use by petitioner (11569 R. 295-299). There is nothing in the form of the findings and order on necessity about exclusive use, and certainly those orders should be interpreted in the light of the full discussion which the court and counsel had before the findings and order on necessity were entered (11569 R. 295-299).

In the interests of justice and to prevent unnecessary litigation, these causes should not be reversed and remanded for retrial on issues already adjudicated.

CONCLUSION

Point I.

The plats of the surveys, Exhibits 9 (11569 R. 197, 311, 715), 10 (11569 R. 201, 365, 716), 11 (11569 R. 203, 374) and 12 (11569 R. 205, 378), were properly admitted in evidence:

(1) Under the Federal Business Records Act;

(2) As a part of the oral testimony of petitioner's witness who verified them.

The Circuit Court of Appeals was required to give effect to Rule 43 (a) of the Rules of Civil Procedure. If it had done so, the plats of the surveys, said Exhibits 9,

10, 11 and 12, would clearly have been admissible under the applicable Federal statute, to-wit, Federal Business Records Act.

The Circuit Court of Appeals was required to give effect to Rule 61 of the Rules of Civil Procedure. Therefore, if any error was committed in admitting into evidence the plats of the surveys, said Exhibits 9, 10, 11 and 12, such error was harmless and nonprejudicial and did not constitute reversible error.

Point II.

The District Court of the United States for the District of Oregon correctly determined the interest acquired by the petitioner in the lands of respondent. New trials on that issue are not required.

We respectfully submit that the Circuit Court of Appeals for the Ninth Circuit erred in reversing the judgments of the District Court of the United States for the District of Oregon.

We respectfully request that writs of certiorari be issued as prayed for.

Respectfully submitted,

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Portland, Oregon,
Counsel for Petitioner.

INDEX

TABLE OF CASES CITED

TABLE OF CASES CITED, continued

TABLE OF TEXTS CITED

TABLE OF TEXTS CITED, continued

TABLE OF STATUTES CITED

CONSTITUTIONS CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

OREGON MESABI CORPORATION,
Cross-Petitioner,

vs.

C. D. JOHNSON LUMBER CORPORATION,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Oregon Mesabi Corporation, respectfully shows that C. D. Johnson Lumber Corporation, appellee in the court below, has petitioned this Honorable Court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit; and your petitioner, also considering itself aggrieved by the decision of said appellate court, respectfully submits the following cross-petition for such writ upon the grounds and for the reasons herein set forth.

A.

STATEMENT OF THE MATTER INVOLVED

By amendments, effected in 1920 and 1924, *Section 18 of Article I of the Oregon Constitution* was changed (as indicated by italics) to read as follows:

> "Private property shall not be taken for public use, nor the particular services of any man *be* demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; *provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.*"
>
> (Note: The 1924 amendment added "waterways" and "water for beneficial use or drainage", which changes are not here pertinent.)

Chapter 2, Title 12, Oregon Compiled Laws Annotated, was enacted in 1921 to implement the 1920 constitutional amendment. This statute is set forth in Appendix A to this petition, together with pertinent procedural provisions of *Chapter 4* of the same title.

Insofar as said amendments to the Oregon Constitution, and the provisions of *Chapter 2, Title 12, O. C. L. A.,* are so construed as to authorize the taking of private property for exclusively private uses, or without just compensation, the application of *Section 1 of the Fourteenth Amendment to the Federal Constitution* is also involved herein.

Petitioner (hereinafter referred to as "Mesabi") is a Delaware corporation and the owner of a block of virgin old growth timber on Euchre Creek, in Northern Lincoln County, Oregon, comprising approximately 4600 acres. C. D. Johnson Lumber Corporation, a Nevada

corporation (hereinafter referred to as "Johnson"), owns a timber tract of 1160 acres, bounded on three sides by Mesabi's holdings but, nevertheless, accessible to the state highway along the Siletz River, over two existing roads crossing Johnson's own cut-over lands and connecting said tract with the highway (R. 699 and 718)*.

In July, 1945, under the statutes set forth in Appendix A, Johnson instituted an action, in the Circuit Court of the State of Oregon for Lincoln County, to condemn a strip of land 60 feet in width and 5807.4 feet in length, for a logging road through Mesabi's timber. Concurrently, another action was instituted to condemn a similar strip, 1367.6 feet in length, for a branch road extending northerly from a junction on Mesabi's land. Both actions were removed to the District Court of the United States for the District of Oregon, on the ground of diversity of citizenship.

Item	*Case 11569*	*Case 11570*
Complaint	2- 8	2-3
Removal proceedings	8-22	4-6
Amended complaint	35-41	8-9

The following issues, among others, were raised by sundry motions, pleadings, and objections in the trial court, and by assignments of error on appeal.

(1) The public use and purpose of the taking ..... (Pages 46, 53, 616)

(2) The necessity for the taking..... (42, 46, 53, 620)

(3) The identity of the property condemned:

(a) As to location of rights-of-way ..... (311-319, 365-374, 619, 626-627, 714, 716)

(b) As to nature and extent of rights taken ..... (42, 127-128, 660-662)

Note (*): Unless otherwise indicated, all references to the record refer to the record in the case identified by Docket No. 11569 in the court below.

(4) The statutory authority for Johnson to condemn Oregon lands.. (45, 616)

(5) The admissibility of certain evidence of fair market value.. (480, 631, 633-635)

(6) The propriety of the court's instructions to the jury (635-646); as to the nature and extent of the property rights condemned. (650-652)

The cases first came on for consolidated trial before the court on the issue of necessity for the taking (R. 183-304), whereupon the District Court found that the taking was necessary, directed the submission of the question of damages to a jury, and ordered that judgment of appropriation and condemnation be entered (R. 79).

The ensuing trial by jury resulted in one verdict for $2550.00 for damages for the taking of the right-of-way for the so-called main road (R. 11569, pages 86-88), including timber thereon valued at $2511.00. By a separate verdict, damages in the sum of $6.00 were awarded for the taking of the right-of-way for the branch road (R. 11570, pages 20-21). Judgments were entered on said verdicts wherein it was ordered that the land described in each complaint, respectively,

> "be and the same hereby is condemned and appropriated to the plaintiff as a right of way for a logging road and said lands are appropriated and vested in the said plaintiff as an unlimited easement with the right to the exclusive use thereof, subject to the right of the defendant, Oregon Mesabi Corporation, to make such necessary crossings of said right of way as will not unreasonably interfere with the use of said right of way by plaintiff."
>
> (R. 11569, pages 93-100.)
>
> (R. 11570, pages 22-28.)

Thereupon Johnson, having paid into court the full amounts of the judgments and costs, took exclusive pos-

session of the lands condemned and has since enjoyed the exclusive occupancy and use thereof, in accordance with the provision of *Section 12-409, O. C. L. A.* (Appendix A). Mesabi is thereby deprived of the use of the most feasible route for transporting 200 million feet of its timber, and cannot log the timber abutting on approximately one and one-half miles of Johnson's roads, without interfering with Johnson's use thereof, or incurring exorbitant expense (R. 561-590). The damages awarded and deposited in court covered only the value of the lands and timber actually taken, and no damages to the property not taken.

From these judgments appeals were taken to the United States Circuit Court of Appeals for the Ninth Circuit, upon the errors assigned and specified on pages 11-18 of Appendix (1) to Brief of Cross-Petitioner, filed herewith.

In its decisions rendered on December 12, 1947, the Circuit Court of Appeals reversed the judgments of the District Court and ordered new trials. Your petitioner contends that both cases should have been dismissed for the reasons that (1) the complaints did not state causes of action, (2) there was no necessity for the taking, (3) the taking was contrary to law, (4) the condemnor was not such a foreign corporation as is specifically authorized by Oregon law to exercise the power of eminent domain, and (5) the irregular strips of land described in the complaints and judgments had not been surveyed and located on the ground so as to enable the appellant-defendant and its value witnesses to identify the same with reasonable certainty.

Issues involved in the controversy, on which the Circuit Court of Appeals ruled adversely to your petitioner, and which petitioner seeks to have reviewed by your Honorable Court, are indicated herein under "Questions Presented".

B.

BASIS OF JURISDICTION

Jurisdiction is invoked under *Section 240 (a) of the Judicial Code,* as amended by *Section 1 of Chapter 229 of the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. § 347 (a),* and this petition is presented under Rule 38 of this Court.

The opinions of the Circuit Court of Appeals for the Ninth Circuit were filed December 12, 1947, and judgments were entered on that date. The decisions have been released for publication, but citations are not yet available. Petitions for rehearing were denied on March 3, 1948. Orders staying the mandates to and including April 12, 1948, pending application for writs of certiorari, were entered on March 8, 1948.

C.

QUESTIONS PRESENTED

The questions for review are as follows:

(1) Is the taking of the most feasible route for logging the owner's block of timber, by the owner of adjacent timberlands, for the exclusive use and benefit of the latter in the removal of such adjacent timber, a valid exercise of the right of eminent domain under *Section 18 of Article I of the Oregon Constitution,* as interpreted by Oregon courts?

(2) Is such taking, under the circumstances indicated, and the proceedings recorded, violative of Section 1 of the *Fourteenth Amendment to the Constitution of the United States?*

(3) Under the provisions of *Section 18 of Article I of the Oregon Constitution,* and *Section 12-207, Oregon Compiled Laws Annotated,* is the owner of lands abut-

ting on a state highway entitled to condemn rights-of-way for logging roads over a neighbor's lands without other proof of necessity than a showing that the same would be more economical to construct, and more convenient to operate, than extensions of its own roads over its own lands?

(4) May the condemnor, upon a new trial ordered by an appellate court, diminish the compensation for the property taken, by relinquishing to the original owner and the general public the exclusive rights already appropriated, taken, and used, under *Section 12-409, O. C. L. A.* (Appendix A), by:

(A) Amending its complaint to describe lesser rights;

(B) Procuring a new order of necessity for the appropriation of an "ordinary easement";

where the following conditions exist?

(a) *Chapter 2, Title 12, O. C. L. A.*, authorizes the taking of "land", subject to reversion of title for non-user (Appendix A);

(b) The highest court of the state has sanctioned the taking of a qualified fee title for right-of-way purposes (*Coos Bay Logging Co. v. Barclay*, 159 Or. 272, 79 P. 2d 672);

(c) The condemnor, by amended complaint, has sought to take the lands therein described and all of the owner's interest therein (R. 35-40);

(d) The condemnor has committed itself, in open court, to take such land and interest as are demanded in the amended complaint (R. 127-128);

(e) The owner has made no objection as to the quantum of title taken (knowing that it could make no practical use of any rights reserved, without interfering with the condemnor's use of the right of way);

(f) Value witnesses for both parties, at a jury trial for the assessment of damages, based their testimony upon the assumption that the condemnor was taking the land (and all timber thereon), and all of the owner's interest therein, except the reversionary title;

(g) The judgment decreed that the land therein described be "condemned and appropriated to the plaintiff as a right of way for a logging road, and said lands are appropriated to and vested in the said plaintiff as an unlimited easement with the right to the exclusive use thereof, subject to the right of the defendant, Oregon Mesabi Corporation, to make such necessary crossings of said right of way as would not unreasonably interfere with the use of said right of way by plaintiff" (R. 96-98;

(h) An appeal was taken from the judgment, but the condemnor, in the interim, paid the amount of the award into court, entered into possession of the condemned land, under the authority of *Section 12-409, O. C. L. A.* (Appendix A), and has occupied the same for its sole and exclusive use and benefit, during the pendency of such appeal and subsequent appellate proceedings, to the exclusion of the owner and the general public.

(5) What significance (if any) has the term "right-of-way", with reference to the quantum of title or extent of interest taken under eminent domain? (R. 747-748.)

(6) Under the Oregon Act of October 21, 1878 *(General Laws, 1878, page 95)*, may a foreign corporation, not of any specific class therein or elsewhere expressly authorized to exercise the right of eminent domain, condemn property in the State of Oregon?

D.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I.

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Whether, under the power of eminent domain, the most feasible route for logging a block of timber may be taken from the owner, by a private owner of adjacent timberlands otherwise accessible over its own roads, for the *exclusive* use and benefit of the condemnor, has not been determined by this Court.

In recognizing, as a proper exercise of the power of eminent domain, the condemnation of property for use in developing mines, arid lands, and water power, this Court has not gone so far as to hold that land may be taken for private logging roads.

On the contrary, the question has been reserved, expressly or by implication, in the following cases:

> *Hairston v. Danville & W. R. Co.*, 208 U. S. 598, 607; 52 L. ed. 637, 641.
>
> *Clark v. Nash*, 198 U. S. 361, 369; 49 L. ed. 1085, 1088.
>
> *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 159; 41 L. ed. 369, 389.

The question is important for the reason that it involves the application of *Section 1 of the Fourteenth Amendment to the Federal Constitution*, and for the further reason that the conservation and protection of the nation's diminishing timber supply are important "public uses".

While the precise question does not appear to have been settled by this Court, the decision of the Circuit Court of Appeals is apparently in conflict with principles announced by this Court in the following cases:

Missouri Pacific Ry. Co. v. Nebraska, 164 U. S. 403, 417; 41 L. ed. 489, 495;

Citizens Savings & Loan Co. v. Topeka, 20 Wall. 655, 664; 22 L. ed. 455, 461;

and other cases going back to the decision of Mr. Justice Story in *Wilkinson v. Leland,* 2 Pet. 627, 657; 7 L. ed. 542, 553.

II.

The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions in the following cases:

As to the public purpose of the taking:

Witham v. Osburn, 4 Or. 319, 322, 323;

Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 209; 46 P. 790, 791;

Apex Transportation Co. v. Garbade, 32 Or. 584, 587; 52 P. 573, 574 (54 P. 367), 62 L. R. A. 513;

City of Dallas v. Hallock, 44 Or. 246, 252; 75 P. 204, 206;

Grande Ronde Electrical Co. v. Drake, 46 Or. 243, 248; 78 P. 1031, 1033;

Anderson v. Smith-Powers Logging Co., 71 Or. 276, 290; 139 P. 736, 741; L. R. A. 1916B 1089;

State v. Hawk, 105 Or. 319, 326; 208 P. 709, 712 (209 P. 607);

Smith v. Cameron, 106 Or. 1, 7-19; 210 P. 716, 718-722 (262 P. 946);

Barkley v. Gibbs, 44 Or. Adv. Shts. 411; 178 P. 2d 918, 919;

Coos Bay Logging Co. v. Barclay, 159 Or. 272, 294; 79 P. 2d 672, 681;

(In the case last cited, the Oregon court clearly indicated that "changes in the Constitution have not altered the rule that, whether the proposed use is in fact public, it is a question for the determination of the court.")

III.

The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

As a step in the due process of law, to which the owner was entitled before being deprived of its property, the court below should have decided all the issues properly presented by appellant's assignments of error, thereby providing proper guidance for the District Court in the conduct of the new trials which were ordered. In this the reviewing court failed in the following particulars:

(a) Instead of determining the important judicial question of whether the *particular taking* was, under the facts and circumstances disclosed by the record, for such a *public use* as to constitute a proper exercise of the power of eminent domain, the court below merely indicated that the *enactment of Chapter 2, Title 12, O. C. L. A.,* was *"a proper exercise of eminent domain."* (R. 744-745.)

(The Oregon cases cited in Paragraph II (a) hereof, and the decision of this Court in *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 159-160; 41 L. ed. 369, 389, indicate that whether the taking is for a public use must be determined from the facts and circumstances of each case.)

(b) In agreeing "with the trial court in its exclusion of evidence on damages * * * offered by Mesabi on the theory that what Johnson sought was a qualified fee" (R. 747-748), the court below was in error, no such evidence having been excluded for the reason stated. The Court failed to pass upon the exclusion of the testimony of a value witness (R. 631) on grounds which did not involve the quantum of title, but did involve the application of the "before and after" rule for determining "fair market value" (R. 462-464), and the factors properly entering into such determination (R. 480). This obvious error of the trial court was an important factor in depriving Mesabi of just compensation, and may be repeated at any future trial.

Oakland Water Front Co. v. Le Roy (C. C. A. 9), 282 F. 385, 386-7;

Orgell, Valuation under Eminent Domain, Sec. 55.

(c) The court below failed to indicate how the location and description of the lands (R. 751-752), and the quantum of title and extent of interest therein sought to be taken (R. 748), were to be determined in advance of new trial, in order to avoid the confusion and uncertainty incident to the original trials (R. 660-662).

(d) The court below (and the trial court) used the term "right-of-way" (R. 747-749) as indicative of an easement, or a quantum of title or interest less than a fee, whereas the term has no such significance, and its use tends to confuse the issues to be tried again.

18 Am. Jur. 745 and *155 A. L. R. 381, 390-405* (Annotation);

Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S. 114, 116; 38 L. ed. 377, 379;

New Mexico v. United States Trust Co., 172 U. S. 171, 181-185; 43 L. ed. 407, 411-412;

Western Union Telegraph Co. v. Pennsylvania R. R. Co., 195 U. S. 540, 570; 49 L. ed. 312, 323.

(e) In directing a redetermination of the quantum of title to be taken, with a view to possible diminution of damages by the ultimate appropriation of inferior rights and interests (R. 750), the court below apparently overlooked the fact that the exclusive rights awarded by the judgments below had already been taken, and used and enjoyed by the condemnor for more than a year.

Section 12-409, O. C. L. A. (see Appendix A);

29 C. J. S. 1015 (citing Coos Bay Logging Co. v. Barclay, 159 Or. 272, 79 P. 2d 672);

Behle v. Loup River Public Power Dist. (Neb.-1940), 293 N. W. 413;

Moll v. Sanitary District of Chicago, 228 Ill. 633, 81 N. E. 1147.

(f) In holding that a Nevada corporation was entitled to condemn Oregon lands (R. 745), the court below nullified *Section 77-320, O. C. L. A.*, grounding its decision on reasons of public policy, premised on conditions not shown to exist by the record, or by common knowledge, and overlooked the circumstance that *Section 77-318, O. C. L. A.*, was inadvertently separated from *Section 77-320, O. C. L. A.*, in the process of codifying *General Laws, 1878, page 95* (see Appendix B), and should be considered in connection with the original context.

Oregonian Ry. Co. Ltd. v. Oregon Ry. & Nav. Co. (C. C.-Oregon-1885), 23 F. 232, 238-239.

The entire record indicates that this litigation, wherein a private industrial corporation seeks to exercise sovereign rights, has so far departed from the normal course that the intervention of this Court is necessary to restore orderly procedure.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, full and complete transcripts of records and all proceedings in the cases numbered and entitled on its docket

No. 11569 Oregon Mesabi Corporation, a corporation, Appellant, vs. C. D. Johnson Lumber Corporation, a corporation, Appellee;

No. 11570 Oregon Mesabi Corporation, a corporation, Appellant, vs. C. D. Johnson Lumber Corporation, a corporation, Appellee,

and that the said judgments of said Circuit Court of Appeals may be so modified by this Honorable Court as to direct a dismissal of said actions, by the District Court of the United States for the District of Oregon, and that your petitioner may have such other and further relief in the premises as may seem meet and just.

OREGON MESABI CORPORATION,

By JOHN A. LAING

and HENRY S. GRAY,
Counsel for Petitioner.

LAING GRAY & SMITH,
JOHN R. BECKER,
Of Counsel.

APPENDIX A

Excerpts from Oregon Compiled Laws Annotated.
Condemnation for Logging Roads.
(Chapter 2, Title 12, Codified from Oregon Laws, 1921, Chap. 357, §§1-7.)

§12-201. "Any person, firm or corporation, who shall require land for transportation of the raw products of the forest may file with the county clerk of the county in which said land is located a statement showing the approximate route of any proposed road or railway and a general description of the tract which said road or railway may travel, and at the same time may file with the clerk of said county a bond in such sum as may be fixed by order of the county court, conditioned upon the payment to the owner or owners of the lands required for said road or railway, of any and all damage which the owners may sustain by reason of entry upon said land for the survey or location of said road or way. When said bond has been filed, such person, firm or corporation shall have the right to enter upon said tract for the purpose of examining, locating or surveying the line of such road or logging railroad."

§12-202. "Any such person, firm or corporation shall have the right to acquire and own all lands reasonably necessary for said logging road or way to promote the transportation of logs or the raw products of the forests. If such person, firm or corporation is unable to agree with the owners of the land over which said logging railroad is necessary, as to the amount of compensation to be paid therefor, such person, firm or corporation shall have the right to condemn so much of the land necessary for such logging railroad, road or ways as may be necessary for the use of such way, road or logging railway, and may maintain a suit for the condemnation thereof in the circuit

court of the county wherein said lands are located; provided, that no land shall be taken hereunder until compensation therefor has been assessed and tendered as herein provided."

§12-203. "No more lands shall be appropriated under the provisions of this chapter than are reasonably necessary for the purposes specified in this act; provided, that no building nor the land upon which same is situated, which is exempt from execution as a homestead under the laws of the state of Oregon, shall be appropriated under the provisions of this act, nor shall any land belonging to the owner of said homestead be appropriated within 100 feet of said building."

§12-204. "Procedure for condemnation under the provisions of this chapter shall be the same, so far as practical, as set forth in sections 12-402 to 12-412, herein, both inclusive."

§12-205. "In assessing damages hereunder, full compensation shall be allowed for the value of the land appropriated and all other injury and damage which the owner may suffer by reason of the appropriation of said land; provided further, that the person, firm or corporation appropriating said land, and its successors and assigns, shall fence with a good and suitable fence both sides of said lands appropriated, in the event such lands are used for agricultural purposes, and shall take such other means and precautions reasonably necessary to protect the adjoining lands not appropriated from damage or injury by reason of the use of the lands appropriated for which it is to be used."

§12-206. "Any property acquired under the provisions of this chapter shall be used exclusively for the purposes set forth herein or such incidental purposes as may be necessary to the continued carrying out of the purposes

herein, and whenever the use of said property as herein contemplated shall cease for a period of two years, the same shall revert to the original owner, his heirs or assigns; provided further, that in assessing the damages the amount allowed shall not be in any manner lessened or decreased by reason of the possibility that said lands may revert to their original owner, as in this section provided."

§12-207. "Any logging road which is necessary for the transportation of a single tract of timber shall come within the provisions of this chapter, whether same be a common carrier or otherwise, and such road shall not come under the jurisdiction of the public service commission of this state unless the owners thereof shall declare it a common carrier."

CONDEMNATION PROCEEDINGS

Pertinent Excerpts from Chapter 4, Title 12, Oregon Compiled Laws Annotated.

§12-401. "Whenever any corporation authorized as in the provisions of this act, to appropriate lands, right of way, right to cut timber, or other right or easement in lands, is unable to agree with the owner thereof as to the compensation to be paid therefor, or if such owner be absent from this state, such corporation may maintain an action in the circuit court of the proper county, against such owner, for the purpose of having such lands, the right to cut timber, including the right to cross or intersect with a located but unconstructed line of railway, appropriated to its own use, and for determining the compensation to be paid to such owner therefor * * *." (Balance of section not pertinent.)

§12-402. "Such action shall be commenced and proceeded in to final determination in the same manner as

an action at law, except as in this title otherwise specially provided."

§12-403. (Not pertinent.)

§12-404. "The complaint shall describe the land, right or easement sought to be appropriated with convenient certainty. If the defendant, or either of several defendants, is a non-resident of this state or unknown, service of the summons may be made by publication as in ordinary cases." (Amendment added by Chapter 168, Oregon Laws, 1945, not pertinent.)

§12-405. (Not pertinent.)

§12-406. "The defendant in his answer may set forth any legal defense he may have to the appropriation of such lands or any portion thereof, and may also allege the true value of the lands and the damage resulting from the appropriation thereof."

§12-407. "Upon the motion of either party, before the formation of the jury, the court, upon the request of either party, shall order a view of the lands or premises in question, and upon the return of the jury the evidence of the parties may be heard and the verdict of the jury given."

§12-408. "Upon the payment into court of the damages assessed by the jury, the court shall give judgment appropriating the lands, property, rights, easements, crossing or connection in question, as the case may be, to the corporation, and thereafter the same shall be the property of such corporation."

§12-409. "Either party to the action may appeal from judgment therein, in like manner and like effect as in ordinary cases; but such appeal shall not stay the proceedings so as to prevent such corporation from taking such lands into possession, and using them for the pur-

poses of the corporation, or from proceeding to exercise the right, enjoy the easement, or make the crossing or connection condemned."

§12-410. "The costs and disbursements of the defendant, including a reasonable attorney's fee to be fixed by the court at the trial, shall be taxed by the clerk and recovered from the corporation, but if it appear that such corporation tendered the defendant before commencing the action an amount equal to or greater than that assessed by the jury, in such case the corporation shall recover its costs and disbursements from the defendant, but the defendant shall not be required to pay the plaintiff's attorney fee."

§12-411. "If a judgment in such action be reversed, and a new trial had, and at such second trial the jury assesses the damages of the defendant at a greater sum than before, the court shall, in addition to the judgment appropriating the lands, right, easement, crossing, or connection as provided in section 12-408, give judgment in favor of the defendant for such excess."

§12-412. "If the defendant accept the damages paid to the clerk, he waives his right of appeal, and if he do not, such sum shall remain in the control of the court, to abide the event of the appeal, and if the defendant or unknown owner of the land do not appear and claim the same, it shall be invested for the benefit of whom it may concern, as in case of unclaimed moneys in the sale and partition of lands."

APPENDIX B

Rights and Powers of Foreign Corporations. Oregon Laws, 1878, page 95.

AN ACT to authorize Foreign Incorporations to do Business and Exercise Their Corporate Powers within the State of Oregon.

Be it enacted by the Legislative Assembly of the State of Oregon:

Section 1. That any foreign incorporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water, gas or other substance, by means of pipes laid under ground, shall, on compliance with the laws of this State for the regulation of foreign corporations transacting business therein, have the same rights, powers and privileges in the exercise of the rights of eminent domain, collection of tolls and other prerogative franchises as are given by the laws of this State to corporations organized within this State, for the purpose of constructing any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water by means of pipes laid under the surface of the ground. (Now embodied in Sec. 77-320, O. C. L. A.)

Sec. 2. Nothing in this act contained shall be so construed as to give to any foreign corporation or corporations, any other or further rights, powers or privileges than may be acquired or exercised by corporations incorporated under the laws of this State; but only so as to give to foreign corporations the same rights, powers and privileges, on a compliance with the laws of this State, as may be acquired or exercised by corporations incorporated under the laws of this State. (Now Sec. 77-318, O. C. L. A.)

Approved October 21, 1878.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

OREGON MESABI CORPORATION,
Cross-Petitioner,

vs.

C. D. JOHNSON LUMBER CORPORATION,
Cross-Respondent.

BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

I.

OPINIONS BELOW

The opinions of the Circuit Court of Appeals for the Ninth Circuit were filed December 12, 1947, but do not yet appear in published reports.

(Case 11569, R. 742-752.)
(Case 11570, R. 62.)

II.

BASIS OF JURISDICTION

The date of the judgments to be reviewed is December 12, 1947 (Case 11569, R. 753; Case 11570, R. 63). Jurisdiction is invoked under *Section 240 (a) of the Judicial Code*, as amended by *Section 1 of Chapter 229 of the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. § 347 (a)*.

Note: *All emphasis, indicated by italics in this brief, is supplied by counsel.*

III.

STATEMENT OF THE CASE

A statement of the matters involved herein is set forth on pages 2-5 of the cross-petition.

For a proper understanding of the situation, however, these conditions should be noted:

(1) Heretofore Mesabi's block of virgin timber has been protected, by its isolation, against such conflagrations as devastated the Tillamook area to the north. A change in Mesabi's policy of conservation is now necessary. The invasion of this block by roads accessible to tourists, campers, hunters, and fishermen, with attendant fire hazards, together with Johnson's logging operations, which will expose Mesabi's timber to combustible slashings and "blow-down" over a front of more than five miles, tend to force early operations for the removal of exposed timber, including that abutting on the roads through Sections 11 and 14.

(2) The exclusive and unlimited rights vested in Johnson by the judgments of November 13, 1946 (R. 98), were the equivalent of a qualified fee title, for all practical purposes, regardless of the unorthodox terminology used in their designation. Theoretically, if Johnson now relinquishes these exclusive rights, the roads could be opened for the development of all the timber on Euchre Creek, and it is reasonable to assume that the amendment to the Oregon Constitution, like the Idaho Constitution, was intended to grant rights to an industry rather than to confer special privileges upon individuals (*Marsh Mining Co. v. Inland Empire Mining & Milling Co.*, 30 Ida. 1; 165 P. 1128, 1130). But a difficulty arises here from the fact that these roads traverse 400 acres of standing timber which it is impossible for Mesabi to log over these roads without *interfering* with the through transportation of timber cut

from adjacent tracts. Not only would some of the abutting timber have to be felled across these roads, but in order to conduct yarding, decking, and loading operations, according to the usual local methods, it would be necessary for Mesabi to install "donkey engines" on the roadways, and top and rig tall spar trees on or along the same, yard the timber onto the roadways by means of steel cables, and conduct loading operations on the roads, all of which would tend to block traffic temporarily.

The reason why joint user of a logging road is impracticable were fully explained by the Oregon court in the case of *Coos Bay Logging Co. v. Barclay,* 159 Or. 272; 79 P. 2d 672, 676-677. To use the hauling roads as logging roads, Mesabi would have to have prior and superior rights. Ordinarily it is assumed that a condemnor may make maximum use of rights-of-way and, for reasons explained in the Barclay case, an owner to whom certain rights were reserved would not be justified in spending money in anticipation of an opportunity to exercise such rights.

IV.

SPECIFICATION OF ERRORS

The United States Circuit Court of Appeals erred:

(1) In not holding that the taking of private lands, for the private purposes and exclusive uses of the condemnor, was not a proper exercise of the power of eminent domain under *Section 18 of Article I of the Oregon Constitution* (R. 744).

(2) In not holding that such taking was in violation of *Section 1 of the Fourteenth Amendment to the Constitution of the United States* (R. 744).

(3) In holding that such taking was necessary, under the circumstances, within the meaning of *Section 18 of Article I of the Oregon Constitution*, and *Section 12-207, O. C. L. A.* (R. 749).

(4) In holding that the condemnor is entitled to relinquish the exclusive rights, already taken under *Section 12-409, O. C. L. A.* (R. 749), and to amend its complaints, long after the actual taking, as a basis for appropriation of lesser rights, such as an "ordinary easement" (R. 748), and to have the damages for the taking mitigated accordingly (R. 750).

(5) In holding that a foreign corporation, not organized for any of the purposes specified in *Oregon General Laws, 1878, page 95*, is entitled to condemn Oregon lands under that law (R. 745).

(6) In failing to dispose of the issues, presented by assignments of error on appeal, in such manner as to guide the trial court, in the conduct of new trials, and thereby prevent the recurrence of obvious errors (R. 744-752).

IV.

ARGUMENT IN SUPPORT OF JURISDICTION ON CERTIORARI

1.

The question of whether the taking was for a public purpose should be reviewed by this Court.

The issue was evaded by the Court below (R. 744-745). It is important by reason of the invasion of rights reserved to citizens by *Section 1 of the Fourteenth Amendment to the Federal Constitution.*

The question has been reserved by the decisions of this Court in the following cases:

Clark v. Nash, 198 U. S. 361, 369; 49 L. ed. 1085, 1088.

Hairston v. Danville & W. R. Co., 308 U. S. 598, 607; 52 L. ed. 637, 641, and in *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 159-160; 41 L. ed. 369, 389, this Court indicated that such questions must be decided, in accordance with the Court's views of constitutional law, "on the facts and circumstances surrounding the subject-matter in regard to which character of the use is questioned," giving due respect to the decisions of the state court.

As a general rule, condemnation for a logging road for use of private parties in lumbering operations is not permissible.

18 Am. Jur. 707-709, Eminent Domain, Sec. 76.

Careful consideration of the decisions of the Supreme Court of Oregon, in the recent cases of *Coos Bay Logging Co. v. Barclay,* 159 Or. 272, 294; 79 P. 2d 672, 681, and *Barkley v. Gibbs,* 44 Or. Adv. Shts. 411; 178 P. 2d 918, indicates that the Oregon Court has not departed from the view, reiterated in the long line of decisions cited on page 10 of the foregoing petition, that "public use" means use by the public, and that a statute authorizing condemnation for a private road would be unconstitutional (178 P. 2d 919).

The Utah theory has been rejected by the Oregon Court, and the cases of *Clark v. Nash,* 198 U. S. 361; 49 L. ed. 1085, and *Strickley v. Highland Boy Gold Mining Co.,* 200 U. S. 527; 50 L. ed. 581, have no application for that reason, and for the further reason that the former involved the irrigation of arid lands, and the latter involved a tramway constructed to serve a mining district.

In the *Coos Bay Logging Company* case (supra) the railroad was designed to develop large tracts of timber under diverse ownership.

The present limitations of "public use" are indicated by the annotator in *54 A. L. R., at page 44,* as follows:

> "From the foregoing authorities, the following conclusions may be drawn: (1) It is erroneous to regard the authorities as divided, generally speaking, into two classes,—one taking the view that the terms 'public use' and 'public benefit' are synonymous under the law of eminent domain, and the other that a right of user by the public is essential to constitute a public use; (2) the general rule is that to constitute a public use there must exist a right of user on the part of the public, or some portion of it, or some public or quasi public agency, after the property has been condemned, and with this right of user is associated a right of regulation by the public so as to secure to it the expected benefits; (3) an exception to this general rule has been recognized by some courts in certain classes of cases, as those relating to mills, dams, water power, mining, irrigation, and perhaps drainage; (4) this exception seems to have arisen in the early mill and water-power cases, because of special economic conditions which have since largely changed; (5) the exception does not appear to have been extended beyond those cases in which property rights were fixed as to location, so that a necessity arose for an extension of the term 'public use,' which does not ordinarily exist in the case of business enterprises generally, as to which there is a choice of location, though one may be more convenient or advantageous than another; (6) the tendency has been to place the decisions, even in those classes of cases in which the exception is recognized by some courts, on other grounds than the law of eminent domain, to refuse to extend the public benefit doctrine, and to take the position that under present conditions, if the question were a new one, a different conclusion would be reached."

In *Sec. 315,* Mr. Lewis *(Eminent Domain, 3d ed.)* discusses the application of the Fourteenth Amendment, and indicates that the taking of private property "to promote the general welfare", is limited to (1) reclamation of wet or arid lands, (2) development of mines, and (3) development of water power.

Mr. Nichols *(Eminent Domain, 2d ed., page 120)* seems to consider it settled that property cannot be taken for private uses, and states *(pages 127-128)* that the Fourteenth Amendment is violated none the less where the state statute is authorized by the state constitution. This author suggests:

> "It is only recently that it has been realized that the public welfare is not served by an unlimited cutting down of timber and that the conservation of the remaining forest lands has become a subject of general interest."

Whether or not the cutting and removal of timber is a more important "public use" than its conservation and protection may depend upon what becomes of the end product. The record in this case does not show whether Johnson's lumber is utilized locally or shipped abroad.

2.

The question whether the taking was necessary should be settled by this Court.

The issue is closely related to that of public use. There are no Oregon decisions, interpreting the meaning of "necessary" as used in *Section 18, Article I of the Oregon Constitution,* and in *Section 12-207, O. C. L. A.*

Decisions holding that the condemnor is entitled to determine the location of a road, where the state or federal government or some governmental subdivision or agency thereof is seeking to take private property, do not appear

to be applicable where the location is left to individual whim, or to the action of officers or directors of a private corporation. Likewise cases holding that the condemnor can decide upon the route to be followed across the land of the condemnee are not applicable where the alternative route is on the condemnor's own land.

> "Where the authority is to take property necessary for the purpose, the necessity of taking particular property for a particular purpose is a judicial one upon which the owner is entitled to be heard." *(Lewis, Eminent Domain, 3d ed., §599.)*
>
> "The company (condemnor) is not the judge of the existence of the necessity." *(Id. §600.)*
>
> "In a California case it is said: 'The question of necessity in a given case involves a consideration of facts which relate to the public, and also to the private citizen whose property may be injured. The greatest good on the one hand and the least injury on the other are the questions to be determined, and these questions are for the jury, in passing on the question of necessity.' In a proceeding by a railroad company to condemn land for a gravel pit it appeared that the taking would be especially injurious to the defendant and the neighborhood, and that there was other property which could be taken without such consequences, and the application was denied. The fact that the company already has property suitably located and available for the purpose may be a sufficient ground for denying the application." *(Id. 601.)*

The maps (R. 699 and 718) show that Johnson already has two roads, from the highway into his 1160-acre tract, over its own lands. What the Oregon Constitution and statute authorizes is a "way of necessity", such as is commonly permitted where the condemnor has no other means of ingress and egress to his isolated property.

Mr. Lewis *(Eminent Domain, 3d ed., § 260)* says:

"Where the constitution sanctions the establishment of 'private ways of necessity,' or 'in cases of necessity,' one cannot be laid out simply because it will be more convenient or less expensive for the applicant, than one on his own land. To create such a necessity as is contemplated, it is probable that the applicant's land would have to be surrounded by the land of others."

In view of the conflict between the decision of the Circuit Court of Appeals and the following authorities, this question should be reviewed.

Gaines v. Lunsford, 120 Ga. 870, 47 S. E. 967; 102 Am. St. Rep. 109.

Chattanooga etc. R. R. Co. v. Philpot, 112 Ga. 153, 37 S. E. 181.

Robinson v. Herring, 20 So. 2d 811, 813.

State ex rel. Stephens v. Superior Court, 111 Wash. 205, 190 P. 234.

State ex rel. Carlson v. Superior Court for Kitsap County, 107 Wash. 228, 181 P. 689.

State ex rel. Miller Logging Co. v. Superior Court, 112 Wash. 702, 191 P. 830.

(Excerpts from the five cases last cited are printed on pages 36-40 of the appendix to petitioner's brief below, marked "Appendix (1) to Brief of Cross-Petitioner" and filed herewith.)

In *Dallas v. Hallock,* 44 Or. 246; 75 P. 204, 206, the Supreme Court of Oregon said:

"Where it is sought to take lands or property of another and appropriate them to a public use or benefit * * * the necessity therefor must not only be averred but proved."

The law of eminent domain should be strictly construed. It is "more harsh and peremptory in its exercise and operation than any other" *(Lewis, §388).*

The brief comments of the court below (R. 747 and 749) do not dispose of the issue of necessity for the taking with any satisfactory degree of finality, and the direction with reference to a new trial (R. 750) leaves doubt, which may perplex the trial court, as to whether the entire issue is to be tried again.

3.

Before setting the cases for new trial, the trial court and counsel are entitled to a decision which will serve as a guide for further proceedings, and prevent the recurrence of errors on which the appeals were based.

(a) The principal objective of the appeals was to obtain a judicial review of the trial court's finding that the taking was for a public use. The attack was not directed against the validity of *Chapter 2, Title 12, O. C. L. A.*, which the court below found to be, in itself, "a proper exercise of eminent domain". Rather, the issues were: (1) Whether that statute, and the Constitutional amendment on which it was based, authorized the taking of Mesabi's property, under the facts and circumstances shown by the record, and (2) even if otherwise susceptible to such interpretation, would such taking violate Mesabi's rights under the *Fourteenth Amendment to the Federal Constitution?* That amendment not only inhibits the Oregon legislature, but also the Oregon courts, and the Oregon people themselves. And its inhibition has the same application to the state and its people as is applicable to the Federal Government under the *Fifth Amendment.*

Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234-239; 41 L. ed. 979, 984-985.

(b) Prior to the jury trial, District Judge Fee had said (opinion of June 27, 1946):

> "Now, as to the rule of damages, I can tell you right now what the rule of damages is, because I have used it consistently for some fifteen years: That is, namely, that the property is appraised before the taking of the road and appraised afterwards, and the difference between the appraisal before and the appraisal afterwards of the fair market value is the amount of damages that you receive."

At the trial, District Judge McColloch apparently concurred in the application of the "before and after" rule (R. 340-342, 353-355, and 358-363). However, Johnson has persistently contended that the measure of damages is the fair market value of the property actually taken, and the jury's awards were so limited, in accordance with later inconsistent and erroneous rulings and instructions of the trial court. On the other hand, although Mesabi followed the "before and after" rule in adducing evidence of value, an unidentified portion of the testimony of one of its appraisers (Morgan, who stated that the fair market value of the tract was $1,397,485.00 before the taking, and $1,196,024.00 after the taking) was stricken by the trial court. Under the decisions of the court below in:

> *Oakland Water Front Co. v. LeRoy,* 282 F. 385, 386-387;
>
> *Puget Sound Power & Light Co. v. City of Puyallup,* 51 F. 2d 688, 697;

the striking of Morgan's testimony was clearly erroneous, and one of Mesabi's principal contentions on appeal was based thereon. The court below entirely mistook the reason for the striking of this testimony (R. 631 and 747-748) and dismissed the issue without any ruling on the application of the "before and after" rule, thereby leaving the way open for recurrence of the same errors in the course of a new trial, and for depriving the owner of just compensation.

(c) Much confusion and uncertainty, in the trial court, resulted from the failure of the condemnor (1) to specify in its complaints the nature and extent of the titles or easements sought to be taken, and (2) to adduce any competent evidence of surveys and locations of the proposed rights-of-way, on the ground. Although the comments of the court below on these issues (R. 748 and 751-752) sustain Mesabi's contentions, there is no indication that the complaints are to be amended, at this late day, so as to take property and rights other than such as have already been taken, or whether (1) Johnson is required to survey and locate the rights of way described in the original complaints, or (2) change the descriptions in the complaints (a) to conform to the property and rights actually taken, or (b) to such property and rights as it may hereafter elect to take. Here, again, the court below leaves the cases in the confused state which prompted the appeals.

(d) The use of the term "right-of-way" to designate quantum of title or extent of interest, or as synonomous with "ordinary" or any other kind of easement, is confusing (R. 747-748, and 751). The law gives, and Johnson sought and actually took, a qualified fee title, or nothing. What the judgments gave is substantially the qualified fee title which railroads ordinarily acquire. Farmers cannot pasture their stock on the right-of-way. The nature of such a title is fully explained in *18 Am. Jur. 745,* and the annotation in *155 A. L. R. 381, 390-405.* The term "right-of-way" indicates a physical segment of land, regardless of the underlying title, which might be a fee simple title, or a mere license. The difference between a "qualified fee" and an "exclusive and unlimited easement" is vague and indefinite, but the latter phrase seems indicative of a superior right because it vests exclusive occupancy for an unlimited time, whereas a qualified fee is terminable for non-user. By reason of *Section 12-206,*

O. C. L. A. (Appendix A), the proper term here is "qualified fee". The court below has added confusion to the issues by its use of the term "right-of-way" (R. 747-749).

(e) After the condemnor has taken an "exclusive" and "unlimited easement" (R. 98), and occupied and used the same for more than a year for its sole and exclusive use and benefit, with the present prospect that Mesabi will continue indefinitely to be deprived of the use of the most feasible route for logging the bulk of the timber on Euchre Creek, it is rather late for Johnson to relinquish the rights acquired and exercised under its judgments, and under *Section 12-409, O. C. L. A.*, and the decision of the court below indicates how Mesabi may be deprived of its property without just compensation (R. 749-750).

(f) The general rule is that a foreign corporation may not condemn lands without specific statutory authority from the local legislature.

29 C. J. S. 814.

23 Am. Jur. 112, Foreign Corporations, §106 (also §186).

Lewis, Eminent Domain (3d ed.) §374.

Fletcher, Cyc. of Corporations, §2908.

Oregonian Ry. Co. v. Oregon Ry. & Nav. Co. (C. C.-Ore.), 23 F. 232, 238.

Helena Power Transmission Co. v. Spratt, 35 Mont. 108; 88 P. 773, 777; 8 L. R. A. (N.S.) 567.

The case of *Northwestern Electric Co. v. Zimmerman,* 67 Or. 150, 135 P. 330, involved a public utility and a different statute, and is not in point here. The court below (R. 745) does not refer to the original *Act of October 21, 1878* (see Appendix B to the foregoing petition) and

apparently was misled by the transposition of *Sections 77-320 and 77-318, O. C. L. A.*, in the process of codification. The decision is in conflict with the decision of this court in *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 36-37; 32 L. ed. 837, 845, wherein it is clearly indicated that the right of eminent domain under this statute is limited to such foreign corporations as are "therein enumerated". The court below, in holding that any foreign corporation may condemn Oregon lands, nullifies the limitations imposed by what is now *Section 77-320, O. C. L. A.*

The original brief, identified as "Appendix (1) to Brief of Cross-Petitioner", and reply brief, identified as "Appendix (2) to Brief of Cross-Petitioner", submitted to the court below, are filed herewith.

CONCLUSION

The court below assumed that Johnson had a right, under the court's liberal interpretation of the Oregon Constitution and statutes, to take such of Mesabi's lands as Johnson might select for the most convenient and economical removal of its timber. The decision indicates that, at this late day, the terms and conditions of the taking may be so modified as to reduce to the minimum the damages for the taking, by reserving to the owner rights which have no practical value. These reservations have no value for the reasons which prompted the rejection of similar reservations in the case of *Coos Bay Logging Co. v. Barclay*, 159 Or. 272, 282-284; 78 P. 2d 672, 676, 677.

A careful reading of the Barclay case shows that no question of necessity for the taking was involved therein, and that the owner was more concerned with the amount of his compensation than with the enforcement of his constitutional rights. Barclay's complaint, that the railroad would have a monopoly "for the removal of billions of feet of timber" on the public domain "and on numerous

tracts owned by other persons", would be equally applicable to any railroad penetrating a remote region. The public use in that case was evident. The case supports Mesabi's contention that, where a limited right is taken, it must be described in the pleadings. The principal issue in the Barclay case involved the unsuccessful attempts of the condemnor to force upon the owners concessions as to joint user, in lieu of the compensation which they were entitled to receive in money.

But the issue here is of broader scope. This Court is asked to pass upon the question of whether a state legislature, or any state or federal court, may sanction the taking of private property for private uses and purposes. The right to abuse the power of eminent domain by such a taking was withheld from the Federal Government by the Fifth Amendment, and withheld from the states by the Fourteenth Amendment.

The following excerpt is quoted from *18 Am. Jur. 633* (Eminent Domain, §4):

> "It is settled, however, that a taking of property which does not comply with the specific clause—that is, a taking for a private use or without just compensation—is a deprivation of property without due process of law (citing *Panhandle E. Pipe Line Co. v. State Highway Commission*, 294 U. S. 613, 79 L. ed. 1090). Accordingly, since the adoption of the Fourteenth Amendment, there is the possibility of a Federal question in every taking by eminent domain under state authority, even if all the requirements of the Constitution of the state are held to have been complied with" (citing nine decisions of this Court).

The Oregon courts have consistently held that "public use" means *use by the public*, and have declined repeatedly to broaden the meaning of that term to include "public welfare" or "private benefit". They have held, also, that whether or not a use is public is a judicial question to be

determined from the facts and circumstances of each case. Under those decisions, Johnson has no more right to condemn a road to its sawmill than it would have to condemn a site for its sawmill.

Nevertheless, the court below, mistaking the real issue, assumed that the legislature could lawfully authorize the taking of private property for private use, and did not pass upon an issue which, according to practically unanimous views of all other courts, is reserved for judicial determination. In fact, it may safely be assumed that the Oregon legislature, in enacting a statute of such apparently broad scope, expected the state courts to continue to exercise their asserted powers to keep the exercise of eminent domain within well-recognized limits.

For this reason, and for the further reason that the decision of the court below has left the issues in such a state of confusion as to jeopardize your petitioner's rights, it is respectfully submitted that the writ of certiorari should be granted.

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SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES (Cont.)

TABLE OF CASES (Cont.)

TABLE OF TEXTBOOKS

TABLE OF STATUTES

No. 736,737

In the Supreme Court of the United States

OCTOBER TERM, 1947

OREGON MESABI CORPORATION,
Cross-Petitioner,

vs.

C. D. JOHNSON LUMBER CORPORATION,
Cross-Respondent.

OREGON MESABI CORPORATION,
Cross-Petitioner,

vs.

C. D. JOHNSON LUMBER CORPORATION,
Cross-Respondent.

BRIEF OF CROSS-RESPONDENT IN OPPOSITION TO CROSS-PETITIONS FOR WRITS OF CERTIORARI

To The Honorable the Supreme Court of the United States:

Cross-respondent, C. D. Johnson Lumber Corporation,

a corporation, through its counsel, in opposition to the Cross-Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof, filed by cross-petitioner, respectfully shows as follows:

PROCEEDINGS IN COURTS BELOW

A. Original jurisdiction of these causes by the District Court of the United States for the District of Oregon was obtained under Sec. 41 (1) (Judicial Code, Section 24, amended) Title 28, U. S. C. A.

B. November 1, 1946, the District Court of the United States for the District of Oregon entered orders adjudging the use and necessity of the condemnation of rights-of-way for logging roads across cross-petitioner's land (11569 R. 79-85; 11570 R. 19-20).

C. November 13, 1946, the judgments of the District Court of the United States for the District of Oregon were entered and filed (11569 R. 93-100; 11570 R. 22-28).

D. December 12, 1947, the opinions of the United States Circuit Court of Appeals for the Ninth Circuit were rendered and filed (11569 R. 742-752; 11570 R. 62). Neither opinion has been officially reported at the time of preparation of this brief.

E. December 12, 1947, the decrees of the United States Circuit Court of Appeals for the Ninth Circuit were entered and filed (11569 R. 753; 11570 R. 63).

F. March 3, 1948, a petition for rehearing of said

causes was denied by the United States Circuit Court of Appeals for the Ninth Circuit (11569 R. 761-768; 11570 R. 71-73).

G. March 8, 1948, the United States Circuit Court of Appeals for the Ninth Circuit filed orders staying issuance of mandates.

STATEMENT OF THE CASE

In order to correct omissions and inaccuracies in the statement of the case as set forth in the cross-petitions for writs of certiorari, cross-respondent shows as follows:

Two actions were brought in the Circuit Court of the State of Oregon for the County of Lincoln by C. D. Johnson Lumber Corporation, a Nevada corporation (hereinafter referred to as "Johnson"), duly qualified for the doing of business in Oregon and operating a sawmill at Toledo, Oregon, for the condemnation of two rights-of-way over the lands of cross-petitioner, Oregon Mesabi Corporation, a Delaware corporation (hereinafter referred to as "Mesabi"), for use as roads in transporting timber and other raw products of the forest from timberlands owned by Johnson to its sawmill at Toledo. The first right-of-way is sixty feet wide and slightly over a mile in length. The other right-of-way is a spur road taking off at a midway point of the first right-of-way and is sixty feet wide and about a quarter of a mile long (11569 R. 2-8; 11570 R. 2-3).

These actions were filed pursuant to Chapter 2, Title 12, of the Oregon Compiled Laws Annotated, which stat-

utes were passed following the adoption by referendum of an amendment to Article I, Section 18, of the Oregon Constitution. The rights-of-way involved traverse rough and sparsely populated lands, valuable almost entirely for the timber thereon. Following the filing of these actions, Mesabi removed them to the District Court of the United States for the District of Oregon (11569 R. 8-22; 11570 R. 4-6).

The two cases were consolidated for trial (11569 R. 77; 11570 R. 17) and proceeded to trial before the District Court (McColloch, J.) on the issue of necessity for the taking (11569 R. 183-304).

At the trial it was shown that Johnson is the owner of a timber tract bounded on three sides by holdings of Mesabi (11569 R. 276, 718). Mesabi in its cross-petition (paragraph 4, pages 2-3) has stated that the timber tract of Johnson is "accessible to the state highway along the Siletz River, over two existing roads crossing Johnson's own cut-over lands and connecting said tract with the highway (R. 699 and 718)."

Said "existing" roads do not connect Johnson's said timber tract with any highway. For a connection to be made it would be necessary to extend said roads in order to transport timber from Johnson's tract. Because of the roughness of the terrain in that area, such extensions are so impracticable as to be impossible. Four expert witnesses, all logging engineers with extensive logging experience, testified as to the necessity for the appropriation of a right-of-way for a logging road across Mesabi's land and to the impracticability of extending said "exist-

ing" roads into the timber tract sought to be logged. The testimony of Carl C. Jacoby, Johnson's logging superintendent, was that the difficulty of taking logs over the corner not surrounded by Mesabi's land, across a canyon and up a steep bluff for 1200 feet was a type of operation unheard of and so impracticable as to be impossible (11569 R. 206-237). The testimony of Henry Thomas, a leading forest engineer since 1912, was that there is no other reasonable or practicable way for Johnson to remove its logs than by the rights-of-way sought to be condemned (11569 R. 240-251). The testimony of Harry C. Patton, a graduate logging engineer practicing since 1921, was that these rights-of-way are necessary and the only reasonable means for removing the timber from Johnson's land (11569 R. 252-257). Merrill H. Ward, a logging engineer for twenty years, testified to the same effect (11569 R. 258-263). Dean Johnson, president of Johnson and in full charge of its operations, testified that he had determined such rights-of-way to be necessary prior to the time these actions were filed (11569 R. 264).

Following the trial on the issue of necessity for the taking, separate orders were issued "adjudging use and necessity" (11569 R. 79; 11570 R. 19).

The two cases were then consolidated for jury trial on the issue of damages (11569 R. 304-653).

Regarding the question of damages, Mesabi has stated in its cross-petition (page 5): "The damages awarded and deposited in court covered only the value of the lands and timber actually taken, and no damages to the prop-

erty not taken." The damages awarded did, in fact, include full compensation for the value of the land appropriated and full compensation for all other injury and damage which Mesabi suffered by reason of the appropriation (11569 R. 642-646).

After the trial separate verdicts were filed (11569 R. 86; 11570 R. 20). Thereupon Johnson paid into court the damages assessed by the jury, and judgments appropriating the rights-of-way were entered (11569 R. 93; 11570 R. 22). Johnson entered into possession of the rights-of-way, subject, however, to the right of Mesabi to make such necessary crossing of the rights-of-way as would not unreasonably interfere with the use of the rights-of-way by Johnson.

Mesabi appealed from the judgments of the District Court to the United States Circuit Court of Appeals for the Ninth Circuit (11569 R. 727-730; 11570 R. 42-45).

The Circuit Court of Appeals rendered its opinions, reversing the judgment of the lower court on two main grounds (11569 R. 742-752; 11570 R. 62): (1) that Oregon law was applicable and that Oregon law did not permit the introduction into evidence of certain plats of surveys (11569 R. 751-752); (2) that the failure of the District Court to make a finding as to whether the rights-of-way should be exclusive or ordinary prevented the proper determination of the measure of damages in each case (11569 R. 748-750).

The Circuit Court of Appeals entered its decrees, reversing the judgments of the District Court (11569 R. 753; 11570 R. 63).

A petition for rehearing of said causes was denied by the Circuit Court of Appeals (11569 R. 762-763; 11570 R. 72-73).

SUMMARY OF ARGUMENT

Cross-respondent summarizes its argument in opposition to the cross-petitions for writs of certiorari as follows:

I

The Circuit Court of Appeals for the Ninth Circuit in deciding that the appropriation of rights-of-way for logging roads over Mesabi's property was for a public use did not decide any question of local law in conflict with decisions of the courts of the State of Oregon.

II

The Oregon statutes under which an owner of timberland has the right to condemn rights-of-way across the land of another reasonably necessary to promote the transportation of logs and raw products of the forest are not in violation of the 14th Amendment to the Constitution of the United States.

III

Reasonable necessity for appropriation of rights-of-way for logging roads over Mesabi's lands was clearly shown.

IV

The term "right-of-way" was properly used by the lower court and by the trial court.

V

Under Oregon law a foreign corporation has the same power and right as a domestic corporation to condemn land necessary for a logging road.

VI

Exclusion by the trial court of certain evidence on damages offered by Mesabi was correctly affirmed.

ARGUMENT

I

The Circuit Court of Appeals for the Ninth Circuit in Deciding That the Appropriation of Rights-of-Way for Logging Roads over Mesabi's Property Was for a Public Use Did Not Decide Any Question of Local Law in Conflict with Decisions of the Courts of the State of Oregon.

The decisions collected on page 10 of the cross-petitioner's brief include a number of decisions rendered prior to the amendment in 1920 of Article I, Section 18, of the Oregon Constitution. None of those decisions are pertinent to the problem of whether or not the present appropriation is for a public use under the constitution and laws of the State of Oregon. The development of the law of Oregon both prior to and after 1920 relative to the power of a person or corporation to condemn a right-of-way reasonably necessary for the transportation of logs and products of the forest is accurately described in

Flora Logging Co. v. Boeing (D. C. Oregon 1930), 43 F. (2d) 145.

In *Anderson v. Smith-Powers Logging Co.* (1914), 71 Or. 276, 139 Pac. 736, the Oregon court held that the condemnation of the land of another for a logging road, under the Oregon statutes which then authorized such condemnation, was unconstitutional under Article I, Section 18, of the Oregon Constitution as not being for a public use, despite the contention that the development of the timber industry of Oregon was a matter of extreme importance, ultimately for the public benefit. The court stated, however (p. 297):

> "* * * if conditions in this state have so changed as to make it necessary to have a change in our Constitution, relating to the taking of property for private uses, the proper remedy lies in amending the Constitution, as has been done in several states."

In 1920 the Constitution of the State of Oregon was amended by adding to Article I, Section 18, the following proviso:

> "Provided, that the use of all roads and ways necessary to promote the transportation of the raw products of mine or farm or forest is necessary to the development and welfare of the state and is declared a public use." (See Laws of Oregon 1921, p. 5.)

Pursuant to this constitutional amendment the legislature of the State of Oregon enacted inter alia Secs. 12-201 et seq., O. C. L. A., under which the present proceedings were commenced.

State vs. Hawk (1922), 105 Or. 319, 208 Pac. 709, cited by Mesabi, is not pertinent to the present discussion. It is in no way similar to this case on the facts and does

not involve the right of an individual to condemn land, but involves and upholds the power of the State of Oregon to condemn lands for a public use. The court states at page 326:

> "The question: What is a public use? is always one of law. Deference will be paid to the legislative judgment as expressed in enactments providing for an appropriation of property, but it will not be conclusive: Cooley's Constitutional Limitations (5 ed.), p. 666.
>
> "The question of whether a proposed use is a public one is for the courts to determine as a question of fact: * * *"

It is true the question of what is a public use not only is a judicial one, to be finally determined by the courts, but it is fundamental that where the people of a state have declared in the organic law of that state that a particular use of land shall be a public one, the courts of that state are bound by that declaration to the extent that this organic law does not violate the Constitution of the United States or some law or treaty made thereunder.

Smith, et al., v. Cameron, et al. (1922), 106 Or. 1, 7-19, 210 Pac. 716, is cited by Mesabi as being contrary to the view that the present taking under Sec. 12-201 et seq., O. C. L. A., is not for a public use. The case involved the right under a different statute of a landowner by condemnation proceedings to obtain the right to enlarge a ditch on the land of an adjacent landowner for the purpose of conveying sufficient water to irrigate his lands and those of his neighbors. The case contains a discussion of the Oregon law as to what is a public use and the deci-

sion holds that the taking there involved, although authorized by the legislature, was not for a public use and was therefore unconstitutional under Article I, Section 18, of the Oregon Constitution. However, the court made these significant comments regarding the effect of the 1920 Amendment to Article I, Section 18 (p. 7 and 8):

> "Article I, Section 18, of our state Constitution as amended in 1920 reads as follows:
>
> " 'Private property shall not be taken for public use, nor the particular services of any man demanded without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; *provided, that the use of all roads and ways necessary to promote the transportation of the raw products of mine or farm or forest is necessary to the development and welfare of the state and is declared a public use.*'
>
> "For convenience that portion which was added to Article I, Section 18, by the amendment of 1920 is italicized. * * *
>
> "It is appropriate to explain that the amendment resulted from the decision rendered in Anderson v. Smith-Powers Logging Co., 71 Or. 276 (139 Pac. 736, L. R. A. 1916B, 1089); and it is worthy of notice that the amendment is limited to 'roads and ways necessary to promote the transportation of raw products of mine or farm or forest.' "

On page 19 the court concludes:

> "If it is desirable as a matter of public policy that a private person may be permitted to condemn private property so that he can irrigate his own private land, the remedy is, as was suggested in Anderson v. Smith-Powers Logging Co., by an amendment to the Constitution: * * *"

Coos Bay Logging Co. v. Barclay (1938), 159 Or. 272, 76 P. (2d) 672, involved the right of an owner of timberland under Section 12-201 et seq., O. C. L. A., to condemn a right-of-way across lands of another for a logging road and railroad to transport logs from its lands and from the lands of owners along the right-of-way. The court decided therein that a private landowner could condemn land for this purpose upon the payment of just compensation without violating either the Constitution of the State of Oregon or the 14th Amendment to the Constitution of the United States. The following statement was made, at page 292:

> "By requested instructions and otherwise, defendants challenged the legality and constitutionality of the proceedings to condemn the right of way."

In the opinions of the people of the State of Oregon and of the legislature and Supreme Court of the State of Oregon, the public welfare of the State of Oregon demands that rights-of-way necessary to promote the transportation of the raw products of the forest should not be made impossible by the refusal of a private owner to sell the right to cross his land.

> cf. *Strickley v. Highland Boy Gold Mining Company* (1906), 200 U. S. 527, 50 L. ed. 581, 583.

The decision by the Circuit Court of Appeals for the Ninth Circuit that the taking of rights-of-way across Mesabi's land in this case was for a public use is in harmony with the Constitution, legislative enactments, and decisions of the Supreme Court of the State of Oregon.

II

The Oregon Statutes Under Which an Owner of Timberland Has the Right to Condemn Rights-of-Way Across the Land of Another Reasonably Necessary to Promote the Transportation of Logs and Raw Products of the Forest Are Not in Violation of the 14th Amendment to the Constitution of the United States.

This Court in several cases has determined that state statutes which permit condemnation by individuals in pursuance of the declared public policy of the state are not in conflict with the 14th Amendment.

In *Hairston v. Danville & W. R. Co.* (1908), 208 U. S. 598, 607, 52 L. Ed. 637, the court said at page 607:

> "The propriety of keeping in view by this court, while enforcing the 14th Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified, and acted upon in Falbrook Irrig. District v. Bradley; Clark v. Nash; and Strickley v. Highland Boy Gold Min. Co.,—ubi supra. What was said in these cases need not be repeated here. No case is recalled where this court has condemned, as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws."

This case involved a condemnation of land by a railroad company for a spur track to furnish access to the factory of a tobacco company and for the storage of cars to be loaded and unloaded by receivers and shippers of freight to this factory and could be used for temporary storage of loaded or empty cars by shippers. This court upheld the taking in that case as being one for a public use with the following comments (p. 608):

> "The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost."

Clark v. Nash (1905), 198 U. S. 361, 49 L. Ed. 1085, 1087, was an action by a private land owner to condemn a right of way for an irrigation ditch under a Utah statute that had been upheld by the Supreme Court of Utah. This court stated at page 367:

> "* * * whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private."

In concluding that the statute which authorized this condemnation was not in conflict with any provision of the United States Constitution as so applied, the court stated at page 369:

"We are, however, as we have said, disposed to agree with the Utah court with regard to the validity of the state statute which provides, under the circumstances stated in the act, for the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from a stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless.

"* * * we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land and which will be valuable and fertile only if water can be obtained. Other land owners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it, and we do not think it necessary, in order to hold the use to be a public one, that all should join in the same proceeding, * * *."

Fallbrook Irrigation District v. Bradley (1896), 164 U. S. 112, 41 L. Ed. 369, involved the validity of an assessment under the irrigation act of California of 1887 for nonpayment of which the plaintiff's land was sold. The assessment was levied to construct water works and irrigation facilities within a particular irrigation district to benefit arid lands within that district. It was objected that the use for which the water was to be procured was not in any sense a public one because it was limited to the landowners who may be such when the water was to be apportioned and that the interest of the public was only that indirect and collateral benefit that it derives from every useful improvement made within the state. The contention was answered by this court at page 161:

"The fact that the use of the water is limited to the

> landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. * * * It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water."

Strickley v. Highland Boy Gold Mining Co. (1906), 200 U. S. 527, 50 L. Ed. 581, involved the condemnation by a mining corporation of a right-of-way for an aerial bucket line, which was upheld by the Supreme Court of Utah. The mining corporation was using the line or way to carry ores, etc., for itself and others from the mines it owned to a distant railroad station. The single question presented was the constitutionality of the Utah statute under the 14th Amendment to the United States Constitution. Mr. Justice Holmes stated at page 531:

> "The question, thus narrowed, is pretty nearly answered by the recent decision in Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676. That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the declared policy of the state. In discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent. In such unusual cases there is nothing in the 14th Amendment which prevents a state from

requiring such concessions. If the state Constitution restricts the legislature within narrower bounds, that is a local affair, and must be left where the state court leaves it in a case like the one at bar.

"In the opinion of the legislature and the supreme court of Utah the public welfare of that state demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong."

In considering the constitutionality of a Washington statute which permitted condemnation for the purpose of a logging road by the owner of timberland, the court in *Ruddock v. Bloedel Donovan Lumber Mills* (9th C. C. A., 1928), 28 F. (2d) 684, 687, referring to the cases of

Clark v. Nash (1905), 198 U. S. 361, 49 L. Ed. 1085;

Strickley v. Highland Boy Gold Min. Co. (1906), 200 U. S. 527, 50 L. Ed. 581;

Hairston v. Danville & W. R. Co. (1908), 208 U. S. 598, 52 L. Ed. 637;

stated:

"If the cases to which we have referred do not offend against the Fourteenth Amendment, we are unable to say that a statute authorizing the owner of timber land to condemn a right of way to give access to and remove his timber has that effect."

In *Flora Logging Co. v. Boeing* (D. C. Oregon, 1930), 43 F. (2d) 145, a logging corporation owning timberland

in Oregon brought suit to condemn, under Sec. 12-201 et seq., O. C. L. A., a right-of-way for a logging railroad across unimproved timberland of the defendant Boeing for the purpose of transporting logs and products of the forest from its land to points where the road could connect with a common carrier railroad. The primary objection raised was that if such condemnation was allowed by the constitution and statutes of Oregon, nevertheless, the taking thereunder violated the 14th Amendment. The court thoroughly reviewed the legislative history of Sec. 12-201 et seq., O. C. L. A., and stated (p. 147):

> "The question, thus narrowed, is answered by a review of the Constitution, statutes, and decisions of the Supreme Court of the state, where the amendment of 1920 to the state Constitution provides 'that the use of all roads and ways necessary to promote the transportation of the raw products of * * * forests is necessary to the development and welfare of the state and is declared a public use,' and the act of the Legislature of 1921 granting the right to condemn for the purposes here sought did not violate the Constitution of the United States.
>
> "The people of the state have, by their Constitution, legislative enactment, and decisions of their highest court, expressed their opinion that the public welfare of the state demands that right of way for the transportation of the raw products of the forest should not be made impossible by the owner of property refusing to consent to sell the right to cross his land."

The only other state having a constitutional provision similar to that contained in Article I, Section 18, of the Oregon Constitution is Idaho. The constitutionality of the Idaho Constitution and procedures thereunder were upheld in

Potlatch Lumber Co. v. Peterson (1906), 12 Ida. 769, 88 Pac. 426;

Blackwell Lumber Co. v. Empire Mill Co. (1916), 28 Ida. 556, 155 Pac. 680.

The condemnation by Johnson of rights-of-way over the land of Mesabi pursuant to Section 12-201 et seq., O. C. L. A., and Article I, Section 18, of the Oregon Constitution was for a public use and did not violate the 14th Amendment to the United States Constitution.

III

Reasonable Necessity for Appropriation of Rights-of-Way for Logging Roads over Mesabi's Land Was Clearly Shown.

When the intended use for which the appropriation is to be made by eminent domain is a public one, the necessity or expediency for the taking is a legislative question which may be determined by the legislature or delegated by it.

In *Rindge Co. et al., v. County of Los Angeles* (1923), 262 U. S. 700, 709, 67 L. ed. 1186, 1193, the court stated:

> "* * * The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. 'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process

in the sense of the 14th Amendment.' Bragg v. Weaver, 251 U. S. 57, 58, 64 L. ed. 135, 136, 40 Sup. Ct. Rep. 62 * * *."

Mississippi and Rum River Boom Company v. Patterson (1879), 98 U. S. 403, 406, 25 L. ed. 206, 207.

Sears v. Akron (1918), 246 U. S. 242, 251, 62 L. ed. 688, 698-699.

Coos Bay Logging Co. v. Barclay (1938), 159 Or. 272, 293, 79 P. (2d) 672.

City of Eugene v. Johnson (1948), 46 Or. Advance Sheets 425, 429.

Notwithstanding the reference by Mesabi at page 27 of its cross-petition to Section 12-207, O. C. L. A., it is provided in Section 12-202, O. C. L. A.:

> "Any such person, firm or corporation shall have the right to acquire and own all lands *reasonably necessary* for said logging road or way to promote the transportation of logs or the raw products of the forests." (Italics added.)

and in Section 12-203, O. C. L. A.:

> "No more lands shall be appropriated under the provisions of this chapter than are *reasonably necessary* for the purposes specified in this act; * * *" (Italics added.)

Thus there has been a determination by the state legislature that a reasonable necessity for the appropriation is the criterion and not an absolute necessity.

Numerous cases have interpreted the meaning of the word "necessary" as used in eminent domain statutes. The overwhelming weight of authority is that absolute and unconditional necessity need not be shown; it is sufficient if,

under all the facts and circumstances, a reasonable necessity or expediency is shown.

In *McCarthy v. Bloedel Donovan Lumber Mills* (C. C. A. 9, 1930), 39 F. (2d) 34, 35, cert. den. (1930), 282 U. S. 840, 75 L. ed. 746, 51 S. Ct. 21, the plaintiff, a corporation engaged in logging, sought to extend its logging railroad by eminent domain proceedings under the Washington statutes. The court, through Judge Dietrich, stated at page 35:

> "* * * Under the law, admittedly it may take only such a right of way as is 'necessary', and the question of necessity is one for the court, to be determined in the light of all the facts. The statute has been construed by the Supreme Court of the state, and by that construction we are bound. The point, however, is not of great importance, for the views of the Washington court are in accord with the doctrine generally prevailing under similar eminent domain statutes. In Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 P. 670, 673, the Washington court said:
>
> " 'But the word "necessity", as used in the statute, "does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity, under the circumstances of the particular case, dependent upon the practicability of another route (here another location), considered in connection with the relative cost to one, and probable injury to the other." '
>
> "And in State ex rel. Postal Telegraph-Cable Co. v. Superior Court, 64 Wash. 189, 116 P. 855, 857, the court said:
>
> " 'We believe that the correct construction of this statute is that those invested with the power of eminent domain have the right in the first instance to select the land which, according to their own views,

is most expedient for the enterprise, and that it invests the court with the power to determine whether specific land proposed to be taken is necessary in view of the general location, and to finally determine the question of necessity for the taking of such specific land when there is evidence of bad faith, or oppression, or of an abuse of the power in the selection.

" 'Plainly the selection by the condemnor is evidence of the highest character that the land selected is necessary for the enterprise, and in the absence of clear and convincing evidence to the contrary it conclusively establishes the necessity. * * * The condemnor does not have to show an absolute necessity, but only a reasonable necessity. As we have said the prima facie case made by evidence of the selection can only be overcome by clear and convincing proof that the taking of the specific land sought would be so unnecessary and unreasonable as to be oppressive and an abuse of the power.' "

Lewis Eminent Domain (Third Edition) §601:

"* * * 'It may be said to be a general rule that, unless a corporation exercising the power of eminent domain acts in bad faith or is guilty of oppression, its discretion in the selection of land will not be interfered with.' If the petitioner is acting in good faith and shows a reasonable necessity for the condemnation, in view of its present and future business, the application should be granted. * * *"

Aurora & G. Ry. Co. v. Harvey (1899), 178 Ill. 477, 53 N. E. 331, 334:

"* * * In the construction of statutes relating to the taking of private property, the word 'necessary' should be construed to mean 'expedient', 'reasonably convenient', or 'useful to the public', and cannot be limited to an absolute physical necessity. This, we think, was certainly the intention of the legislature

when the act was passed. The view here expressed seems to be well supported by the authorities. * * *"

Also see:

Meriwether v. Board of Directors (C. C. A. 8, 1908), 165 Fed. 317, 319.
Coos Bay Logging Co. v. Barclay (1938), 159 Or. 272, 294, 79 P. (2d) 672.
Spring Valley Water-Works v. Drinkhouse (Cal., 1891), 92 Cal. 528, 28 Pac. 681, 682.
In re New Haven Water Co. (1912), 86 Conn. 361, 85 Atl. 636, 639.
Wilton v. St. Johns County (Fla., 1929), 123 So. 527, 65 A. L. R. 488, 501.
Piedmont Cotton Mills v. Georgia Ry. & Electric Co. (1908), 131 Ga. 129, 62 S. E. 52, 55.
Minear v. Plowman (Iowa, 1924), 197 N. W. 67, 68.
Davidson et ux v. Commonwealth ex rel (Ky., 1933), 61 S. W. (2d) 34, 36.
Warden v. Madisonville, H. & E. R. Co. (Ky., 1908), 108 S. W. 880, 882.
Commissioners of Parks and Boulevards v. Moesta (Mich., 1892), 51 N. W. 903, 905.
State et al., v. Whitcomb et al. (Mont., 1933), 22 P. (2d) 823, 826.
Sayre v. City of Orange (N. J., 1907), 67 Atl. 933.
In re Application of Staten Island Rapid Transit Railroad Co. (1886), 103 N. Y. 252, 8 N. E. 548.
In re Union El. R. Co. (1889), 113 N. Y. 275, 21 N. E. 81, 82.
Seabrook v. Carolina Power & Light Co. (S. C., 1930), 156 S. E. 1, 2.
White v. Johnson et al. (S. C., 1929), 146 S. E. 411.
Miller et al. v. Town of Pulaski (1912), 114 Va. 85, 75 S. E. 767, 768-9.
State ex rel. v. Superior Court (Wash., 1923), 219 Pac. 857, 858.

Chicago & N. W. Ry. Co. v. City of Racine (Wis., 1929), 227 N. W. 859, 831.
29 C. J. S., Eminent Domain, § 90, p. 886.
18 Am. Jur., Eminent Domain, § 107, p. 734, and cases cited therein.

The determination of the necessity or expediency of the exercise of the power of eminent domain by the grantee of that power, in the absence of fraud, bad faith or abuse of discretion, is final and is not subject to review by the courts.

City of Eugene v. Johnson (1948), 46 Or. Advance Sheets 425, 429.
Coos Bay Logging Co. v. Barclay (1938) supra, p. 294.
Patterson Orchard Co. v. Southwest Arkansas Utilities Corporation (1929), 179 Ark. 1029, 1033, 18 S. W. (2d) 1028, 65 A. L. R. 1446, 1454.
Douglass et al. v. Byrnes et al. (C. C. D. Nev. 1893), 59 Fed. 29, 32; affirmed *Byrnes v. Douglass* (C. C. A. 9, 1897), 83 Fed. 45.
Wilton v. St. Johns County (1929), 98 Fla. 26, 123 So. 527, 535, 65 A. L. R. 488, 502.
Postal Tel. Cable Co. v. Oregon Short-Line Railroad Company (1901), 23 Utah 474, 484, 65 Pac. 735.
State ex rel Stephens v. Superior Court (1920), 111 Wash. 205, 190 Pac. 234, 235 (cited in Mesabi's brief).
Lewis, Eminent Domain (3rd Ed.) § 601.

That some other route or location could be selected which is more suitable is not a proper objection for the purpose of showing a lack of necessity.

Oregon-Washington R. & N. Co. v. Wilkinson (C. C. E. D. Wash., 1911), 188 Fed. 363, 368.
Petition of Fayette County Com'rs. (1927), 289 Pa. 200, 137 Atl. 237, 240.

Sisters of Providence v. Lower Vein Coal Co. (Ind. 1926), 154 N. E. 659, 665.
State v. Superior Court for Grays Harbor County (Wash. 1941), 119 P. (2d) 694, 702.
State ex rel v. Superior Court of King County (1907), 46 Wash. 516, 90 Pac. 663, 665.
State et al. v. Whitcomb et al. (Mont., 1933), 22 P. (2d) 823, 826.

The parties herein agreed that the proper method under the Oregon law for the determination of the question of necessity was to submit the matter to the court sitting without a jury (11569 R. 175-176).

At the hearing four expert witnesses, all logging engineers with extensive logging experience, testified for Johnson as to the necessity for the appropriation. The testimony was uncontroverted that it was necessary to condemn Mesabi's land for rights-of-way for logging roads in order to remove timber from Johnson's timber tract (11569 R. 206-237, 240-251, 252-257, 258-263, 264).

Based upon the evidence before it, the District Court made a finding that these rights-of-way are necessary for Johnson for the transportation of raw products of the forest (11569 R. 79).

The Circuit Court of Appeals for the Ninth Circuit decided that "the court found such necessity on ample evidence" (11569 R. 749). The finding of the District Court, affirmed by the Circuit Court of Appeals, should not be disturbed in the absence of clear error. *Rule* 52 (*a*), *Rules of Civil Procedure:*

> "* * * Findings of fact shall not be set aside unless clearly erroneous, * * *."

This Court has held that concurrent findings of fact by the two courts below will not ordinarily be disturbed.

Boehmer v. Penn. R. Co. (1920), 252 U. S. 496, 64 L. ed. 680, 40 S. Ct. 409.

Goodyear Tire & Rubber Co. v. Ray-O-Vac Co. (Ill. 1944), 321 U. S. 275, 88 L. ed. 721, 64 S. Ct. 593.

There was an ample showing of necessity for the appropriation of Mesabi's land for rights-of-way for logging roads.

IV

The Term "Right-of-Way" Was Properly Used by the Lower Court and by the Trial Court.

The Circuit Court of Appeals for the Ninth Circuit and the trial court properly used the term "right-of-way" (11569 R. 747, 748, 751) as indicating an easement or a quantum of title or interest less than a fee, and the use of the term in this manner in no way confused the issues in this case.

Rights-of-way granted to or condemned by a railroad for railroad purposes have been characterized as *sui generis* and, no doubt, a railroad right-of-way may in some cases constitute more than a mere easement, partaking of the character and nature of a fee simple title.

New Mexico v. United States Trust Co. (1898), 172 U. S. 171, 180-185, 43 L. Ed. 407, 411-412.

Western Union Telegraph Co. v. Pennsylvania Railroad Co. (1904), 195 U. S. 540, 570, 49 L. Ed. 312, 323.

155 A. L. R. 381, 389-400, 403-404.

But even when a railroad right-of-way is involved, the authorities indicate that ordinarily the term "right-of-way" designates no more than an easement, an incorporeal hereditament, absent the existence of a statute expressly or impliedly authorizing the condemnation by the railroad of a fee simple.

1 *Thompson, Real Property* (1924), § 420.
18 *Am. Jur., Eminent Domain,* § 121, p. 745-746.
155 *A. L. R.* 381, 384, 386, 389.

In any event, however, a railroad right-of-way is not here involved so the above authorities cited by Mesabi are not in point.

Sections 12-201 and 12-202, O. C. L. A., use the phrases "any proposed road or railway", "said road or railway", "such road or logging railroad", "logging road or way", "such logging railroad, road or ways". The complaints herein allege that the rights-of-way involved were being appropriated for a "logging road" (11569 R. 6; 11570 R. 2). The only reasonable interpretation of the complaints under the statute is that a logging road in the common sense of the words was intended.

The Supreme Court of the State of Oregon has used

the term "right-of-way" many times in referring to the nature of the interest to be acquired by a condemnor under Section 12-201 et seq., O. C. L. A., and clearly did so with the meaning that the interest acquired was an easement or title less than a fee.

> *Coos Bay Logging Co. v. Barclay* (1938), 159 Or. 272, 276, 278, 279, 280, 281, 284, 286, 290, 294, 295.

In *Flora Logging Co. v. Boeing* (D. C. Ore., 1930), 43 F. (2d) 145, 146, 148, the court likewise characterizes the interest condemned under Section 12-201 et seq., O. C. L. A., as a "right-of-way".

In *Shaw v. Proffitt* (1910), 57 Or. 192, 203, 109 Pac. 584, 110 Pac. 1092, the court stated, in defining the term "right-of-way" with reference to a right to maintain an irrigation ditch across the land of another:

> "* * * plaintiff requested of Failing 'a right of way' for an irrigating ditch across his lands. A right of way is an easement of perpetual use, a charge or burden upon the land of one for the benefit of another."

Many other courts have held that "right-of-way", in cases not involving railroad rights-of-way, signifies merely an easement, an incorporeal hereditament.

> *Clawson v. Wallace* (1898), 16 Utah 300, 52 Pac. 9, 10.
>
> *Jean v. Arseneault* (1931), 85 N. H. 72, 153 Atl. 819, 820.

Blake v. Boye (1907), 38 Colo. 55, 88 Pac. 470, 471-472.

Shaw v. Proffitt (1910), 57 Or. 192, 109 Pac. 584.

Oswold v. Wolf (1888), 126 Ill. 542, 19 N. E. 28, 30.

Flaherty v. Fleming (1906), 58 W. Va. 669, 52 S. E. 857, 858-859.

This Court has used the term "right-of-way" or "way" in referring to easements or interests in land of a quantum less than a fee in cases not involving railroad rights-of-way.

Strickley v. Highland Boy Gold Mining Co. (Utah, 1906), 200 U. S. 527, 529, 530, 50 L. ed. 581, 583.

Clark v. Nash (1905), 198 U. S. 361, 362, 370, 49 L. ed. 1085, 1088.

During the course of the hearing upon the necessity of the appropriation and prior to the beginning of the trial before the jury, this matter was discussed by counsel and the court (11569 R. 290-291, 295-299). At that time Johnson explained as its interpretation of the law, which interpretation was subsequently adopted by the court, that Johnson would obtain by these proceedings an unlimited easement, which would be subject to the right of Mesabi to make necessary crossings (11569 R. 295). In the course of this discussion the court said: "* * * I had the same theory, that you are taking an easement rather

than the fee" (11569 R. 298). Thus, prior to the presentation of any evidence to the jury, Mesabi understood what Johnson sought to condemn. It made no objection thereto other than that the complaints did not expressly state the title that Johnson would obtain.

Counsel for Mesabi frequently referred throughout the trial in statements to the trial court and in examining witnesses to the rights being condemned by Johnson as "rights-of-way" (See 11569 R. 180, 181, 264, 266.)

In the light of the foregoing authorities, the discussion between the trial court judge and counsel referred to above, and the use of this term by Mesabi's counsel, the term "right-of-way" was properly and correctly used by the lower court and by the trial court in describing the rights sought to be condemned by Johnson and did not have any tendency to confuse the issues tried by the court or by the jury.

V

Under Oregon Law a Foreign Corporation Has the Same Power and Right as a Domestic Corporation to Condemn Land Necessary for a Logging Road.

The authorities cited by Mesabi to the effect that a foreign corporation may not condemn lands without specific statutory authority from the local legislature are not applicable for the reason that the legislature in Oregon has conferred on foreign corporations the power to condemn lands necessary for logging roads.

Section 12-201, O. C. L. A., relating to the condemnation for logging roads, begins:

"Any person, firm or corporation who shall require land * * *"

Section 12-202, O. C. L. A., relating to the right to acquire and condemn lands for logging roads, begins:

"Any such person, firm or corporation shall have the right to acquire * * *"

The rule is well established that statutes conferring the power of eminent domain on "any" or "every" corporation or "all" corporations bestow it on foreign as well as domestic corporations.

18 *Am. Jur., Eminent Domain,* § 30, p. 656:

"By the decided weight of authority, statutes conferring the power of eminent domain on 'every' corporation or 'any' corporation, or in like general terms, have been held to bestow it on foreign, as well as domestic, corporations. A grant of the power of eminent domain has also been held to result from a general grant of power to foreign corporations."

23 *Am. Jur., Foreign Corp.,* § 189, pp. 174-175:

"According to the majority rule, however, the general language in statutes relating to eminent domain and to foreign corporations may be sufficient to confer on such corporations the right to condemn property within the state. Statutes conferring the power on 'any' corporation or 'every' corporation are ordinarily so construed, at least where no legislative intent to confine their benefits to domestic corporations appears.[1] Foreign corporations which become entitled to all the rights and privileges of domestic corporations upon compliance with the statutory conditions for admission to do business in the state are permitted in a number of jurisdictions to exercise

"(1) * * * *Northwestern Electric Co. v. Zimmerman,* 67 Or. 150, 135 P. 330, Ann. Cas. 1915C, 927."

the right of eminent domain to the same extent as similar domestic corporations."

29 *C. J. S., Eminent Domain,* § 25, p. 815:

"The right of a foreign corporation to exercise the power of eminent domain may be gathered by implication. It may be conferred by statutes domesticating foreign corporations on compliance with the statutory prerequisites to doing business in the state; by conferring on them the same powers as may be exercised by domestic corporations; by permitting them to take and hold real estate; by giving the power to 'any person or corporation' or 'any and all corporations' engaged in a designated business;[60] or by conferring the right on 'every railroad corporation' or 'all existing corporations'. Likewise, it has been held that a foreign corporation is included in a statute authorizing 'any person' to exercise the power of eminent domain."

17 *Fletcher Cyclopedia Corporations,* 184-185:

"It is competent for the state to delegate the power of eminent domain to corporations, both domestic and foreign. So the legislature of a state may, unless restricted by constitutional provisions, confer the power upon foreign corporations to the same extent as upon domestic ones,[89] or may confer such power upon foreign corporations under certain conditions, and with certain limitations."

Northwestern Elec. Co. v. Zimmerman (1913), 67 Or. 150, 152-153, 135 Pac. 330, referred to in the footnotes above, involved an action by a Washington corporation in Oregon to condemn trees which were alleged to menace its line of poles and wires being constructed to convey electric current.

"(60) Or.—*Northwestern Electric Co. v. Zimmerman,* 135 P. 330, 67 Or. 150, 152, Ann. Cas. 1915C, 927."

"(89) Oregon. *Northwestern Elec. Co. v. Zimmerman,* 67 Ore. 150, 135 Pac. 330, Ann. Cas. 1915C, 927."

"Plaintiff relies exclusively upon Section 6245, L. O. L., (now § 112-501, O. C. L. A.) which provides: 'A right of way and privilege is hereby granted to any person, persons, or corporation to construct, maintain, and operate telegraph lines, telephone lines, and lines and wires for the purpose of conveying electric power or electricity, along the public roads, highways, and streets of the state,' etc. Provision is thereafter also made for securing rights of way therefor. Plaintiff contends that this statute includes foreign corporations. * * * No doubt when first enacted it was intended to include foreign telegraph companies, as the language naming the persons to whom the privilege is extended is general: 15 Cyc. 574; In re Marks, 6 N. Y. Supp. 105; In re Ohio Valley Gas Co., 6 Pa. Dist. 200. * * * Our statute (Sections 6726, 6727, 6728, L. O. L.) (now §§ 77-301, 77-302 and 77-304, O. C. L. A.) provides when foreign corporations may do business within the state; and it may be considered as an invitation to foreign corporations to come into the state, to enter upon the business for which incorporated, and to that extent, when the conditions are complied with, the corporations, by implication, are extended all the powers and privileges necessary to carry out such business. Such a compliance with the statute has now become a prerequisite to foreign corporations entering the state under Section 6245, L. O. L. In New York, N. H. & H. R. R. Co. v. Welsh et al., 143 N. Y. 411 (38 N. E. 378, 42 Am. St. Rep. 734), it is held that the expression 'any railroad corporation' in the general railroad act of that state must be taken in its comprehensive sense and includes foreign railroad corporations, the statute having authorized foreign corporations to do business in the state upon complying with certain requirements, and says: 'Pro tanto it is settled here under the sanction of our laws, and to the extent of its existence and operation here, in the contemplation of those laws, it is pro hac vice a state corporation.' * * * Therefore, we are of the opinion that the privileges granted by Section 6245, L. O. L., extend to foreign corporations."

An adjudication by a state supreme court that a corporation of another state has the right to exercise the power of eminent domain is conclusive upon the United States courts.

> *Stone v. Southern Illinois & Mo. Bridge Company* (1907), 206 U. S. 267, 272, 51 L. ed. 1057, 1060, 27 S. Ct. 615.

Oregon Railway and Navigation Company v. Oregonian Railway Company (1889), 130 U. S. 1, 32 L. ed. 837, heavily relied on by Mesabi, is not in point because the statute there involved did not contain the words "any person, firm or corporation," or similar words.

Helena Power Transmission Co. v. Spratt (1907), 35 Mont. 108, 88 Pac. 773, cited by Mesabi, is not in point because the Montana statutes then in effect clearly granted the power of eminent domain to domestic corporations only.

As pointed out by the lower court, if the right of eminent domain were denied to a foreign corporation such as Johnson, it would deny to Oregon the utilization of large sums of money by out-of-state investors in the logging industry of the state, thereby depriving the state of one of its "largest sources of income and, incidentally, one of the state's largest sources of taxation" (11569 R. 745).

In Oregon a foreign corporation has the same power and right as a domestic corporation to condemn land necessary for a logging road.

VI

Exclusion by the Trial Court of Certain Evidence on Damages Offered by Mesabi Was Correctly Affirmed.

The Circuit Court of Appeals for the Ninth Circuit correctly affirmed the exclusion by the trial court (11569 R. 631, 633-635) of evidence on the issue of damages offered by Mesabi through its witness, Morgan (11569 R. 462-464, 470-477, 480). The record makes it clear that the trial court's exclusion complained of by Mesabi related only to those portions of Morgan's testimony which related to improper damages (11569 R. 480, 631, 633-635). Morgan obviously based his estimate of the depreciation of the fair market value of the entire tract of land belonging to Mesabi not upon the condemnation and use of the logging roads sought by Johnson but upon the prospective logging operations by Johnson upon its own lands. Referring to Exhibit 13, which was prepared by Mesabi, it may be seen that the same elements of risk and damage, if such, in fact, existed, would have been present when Johnson logged its own lands on Sections 10 and 15 without the use of the condemned roads. Furthermore, should Johnson have been able to remove the timber from the tracts in question by crossing only its own lands, the same damages as those testified to by Morgan would have occurred.

The witness was not required by the court to lump all of the elements of injury together. The witness lumped all of these elements together because he himself was unable to segregate them (11569 R. 476). Even on redirect examination when Morgan had ample opportunity

to explain or segregate the damages, he again assigned the major causes of injury to Mesabi from these appropriations to the logging operations which Johnson had a right to carry on notwithstanding any condemnation proceeding (11569 R. 483).

Morgan testified that his estimate was based not upon the fire hazard from the use of the appropriated lands but on the fire hazard to Mesabi from operations upon Johnson's own lands. When the court struck out this part of Morgan's testimony, it struck that portion only relating to the inclusion of clearly improper damages. This was emphasized soon thereafter (11569 R. 633-635).

The matter struck out was not a proper element of damages; it brought in matters not relevant and which could confuse the jury, and the striking of such testimony was proper.

In *Puget Sound Power and Light Co. v. City of Puyallup* (C. C. A. 9, 1931), 51 F. (2d) 688, 693, 695, the court stated:

> "It would perhaps have been better for the parties, after qualifying their witnesses, to have merely asked the basic questions, 'What is the market value of the property taken?' and 'What is the depreciation of the market value of the property retained by reason of its severance from the property taken?' giving the witnesses full opportunity to explain the basis of their valuation. In such case no doubt the same questions would come up on direct and cross examination, for, if it appeared either on direct or cross examination that the witness had pursued a wholly unwarranted course in arriving at his estimate of value, it would be necessary to make correction thereof either

by striking out his estimate of the market value or by instructing the jury to disregard that portion of the value due to the erroneous method."

CONCLUSION

Questions (1), (2), (3), (5) and (6) of the Questions Presented, as set forth in Mesabi's Cross-Petitions for Writs of Certiorari to the United States Circuit Court of Appeals, have been fully answered. Question (4) is hypothetical.

We respectfully submit that the questions specifically brought forward by the cross-petitions for writs of certiorari and the reasons relied on for allowance of the writs are not of sufficient merit to warrant review on writs of certiorari.

Respectfully submitted,

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